163 U.S. 280

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 285.

THE RIO GRANDE WESTERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

FRANK LEAK.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED OCTOBER 14, 1893.

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1 In the District Court of the Third Judicial District, Utah Territory, Salt Lake County.

FRANK LEAK, Pl't'ff & Resp't,
vs.
THE RIO GRANDE WESTERN RAILWAY COMPANY, Def't and App'l't. } No. 386.

Transcript.

Filed and transmitted May 18th, 1893.

HENRY G. McMILLAN, *Clerk*,
By GEO. D. LOOMIS, *Deputy*.

Filed in the supreme court May 18th, 1893, at Salt Lake City, Utah.

JOS. P. BACHE, *Clerk*,
By JOHN C. SHIPP,
Deputy Clk.

2 TERRITORY OF UTAH, } *ss:*
County of Salt Lake, }

In the District Court of the Third Judicial District.

FRANK LEAK, Plaintiff,
vs.
RIO GRANDE WESTERN RAILWAY COMPANY, a Corporation, Defendant. } Complaint.

The plaintiff above named comes and complains of the above-named defendant, and for cause of action alleges:

1st. That the said defendant, The Rio Grande Western Railway Company, is now and was at all times hereinafter mentioned a corporation organized and existing under and pursuant to the laws of Utah Territory, and is and was the owner of a certain railroad, together with the cars and rolling stock and appurtenances belonging thereto, in or near Bingham Canyon, so called, in the county of Salt Lake and Territory of Utah, and is and was engaged in operating the same and operating and running cars thereon.

2nd. That on or about the 11th day of July, A. D. 1891, this plaintiff was engaged in his business of hauling ore to cars of the defendant situated on its said track, and was travelling with his team of horses and wagon on a wagon road usually travelled and provided by defendant to be traveled in the business of the
3 said hauling of said ores from said cars, and was then at or about the place where said wagon road crosses the railroad aforesaid, and as the plaintiff had reached said place or crossing the said defendant carelessly and negligently caused a train of cars to approach said crossing and then and there to pass rapidly over the track of said railroad, and negligently and carelessly omitted its duty

whilst approaching said crossing to give any signals or warning whatever of the approach of said cars or to stop or to slacken the speed thereof, by reason whereof this plaintiff, without any fault on his part was unaware of their approach.

3rd. That in consequence of the premises and of the negligence and carelessness of defendant as aforesaid the said train of cars struck the plaintiff and said horses and wagon and overset said wagon, and the plaintiff was thereby thrown with great force and violence upon the ground and underneath the said wagon and cars, and was thereby greatly bruised, crushed, and maimed, insomuch that it became necessary to amputate and the left leg of the plaintiff was amputated, and thereby inflicting upon the plaintiff lasting and permanent bodily injuries, and thereby plaintiff was caused great bodily pain and mental anguish and was thereby damaged in the sum of twenty thousand dollars, and plaintiff was thereby compelled to and did lay out and expend for doctor's medical attendance one hundred and five dollars.

II.

As a second cause of action against the said defendant plaintiff alleges and shows—

That the said defendant, The Rio Grande Western Railway Company, is now and was at all the times hereinafter mentioned a corporation organized and existing under and — pursuance of the
4 laws of Utah Territory, and is now and was the owner of a certain railroad, with the cars and rolling stock and appurtenances belonging thereto, in or near Bingham Canyon, so called, in the county of Salt Lake and Territory of Utah, and is and was engaged in operating the same and operating and running cars thereon.

2nd. That on or about the 4th day of July, 1891, this plaintiff was engaged in his business of hauling ore to cars of the defendant situate on its said track, and was traveling with his team of horses and wagon on a wagon road usually traveled and provided by defendant to be traveled in the business of the said hauling of said ores to said cars, and was then at or about the place where said wagon road crosses the railroad aforesaid, and as the plaintiff had reached said place or crossing the said defendant carelessly and negligently caused a train of cars to approach said crossing and then and there to pass rapidly over the track of said railroad, and negligently and carelessly omitted its duty whilst approaching said crossing to give any signals or warning whatever of the approach of said cars or to stop or to slacken the speed thereof, by reason whereof this plaintiff, without any fault on his part, was unaware of their approach.

3rd. That in consequence of the premises and of the negligence and carelessness of said defendant as aforesaid the said train of cars struck and killed one of the plaintiff's said horses, said horse being of the value of one hundred and fifty dollars, thereby damaging the plaintiff in the sum of one hundred and fifty dollars, and also

struck and thereby broke and destroyed plaintiff's said wagon, the said wagon being of the value of one hundred and fifteen dollars, thereby damaging the plaintiff in the further sum of one
5 hundred and fifteen dollars.

Wherefore, the premises considered, plaintiff demands judgment against the said defendant for the sum of twenty thousand three hundred and seventy ($20,370) dollars and the costs of this suit, and other proper relief.

POWERS & HILES,
Attorneys for Plaintiff.

TERRITORY OF UTAH, }
County of Salt Lake, } *ss:*

Frank Leak, being duly sworn, deposes and says that he is the plaintiff in the above-entitled action; that he has heard read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

FRANK LEAK.

Subscribed and sworn to before me this 21st day of October, 1891.

D. N. STRAUP,
[SEAL.] *Notary Public.*

(Indorsed:) 9898. Third district court. Frank Leak, plaintiff, *vs.* Rio Gran-e Western Railway Co., defendant. Complaint. Service admitted Oct. 22nd, 1891. 20 days to plead. Bennett, M. & B., def't's att'ys. Filed Oct. 22nd, 1891. Henry G. McMillan, clerk, by George D. Loomis, deputy. No issue. Powers & Hiles, for plaintiff.

6 UTAH TERRITORY, }
County of Salt Lake, } *ss:*

In the District Court of the Third Judicial District.

FRANK LEAK, Plaintiff,
vs.
THE RIO GRANDE WESTERN RAILWAY COMPANY, Defendant.

Now comes the defendant and for answer to the first cause of action in the plaintiff's complaint denies that the plaintiff was at the time or place alleged and referred to traveling with his team of horses and wagon or otherwise traveling on the alleged or any wagon road provided by the defendant to be travelled in the business alleged or otherwise, and denies that at the time or place alleged or at any time or place or under the circumstances alleged or under any circumstances whatever the defendant carelessly or negligently caused or allowed a train of cars of any cars to approach the crossing referred to or the place where the plaintiff was engaged as alleged or otherwise or negligently or carelessly caused or allowed the same to pass rapidly or otherwise over the track of said road or negligently

or carelessly omitted its duty in the respect alleged or otherwise or failed to give any signals or warning whatever of the approach of said cars or negligently or carelessly failed to stop or slacken the speed thereof, or that by reason of any of the negligence or carelessness alleged in the complaint or of any negligence or carelessness whatever on the part of the defendant the plaintiff, without any fault on
7 his part or otherwise, was unaware of their approach or the cars aforesaid struck the plaintiff or his horses or wagon or overset said wagon, or that thereby the plaintiff was thrown with great or any force or violence upon the ground or underneath said wagon or cars or otherwise thrown or was thereby greatly or at all bruised, crushed, or maimed, or that by reason of the facts alleged or by reason of any negligence on the part of the defendant the plaintiff sustained any injury whatever to his person or property, or that by reason of any such negligence on the part of the defendant or by reason of the injuries alleged or any injuries received through any negligence of the defendant it became or was necessary to amputate*d* the limb referred to or that said limb was amputated, or that thereby lasting or permanent or any bodily injuries were inflicted upon the plaintiff, or that the plaintiff was caused great or any bodily pain or mental anguish or was thereby damaged in the sum of twenty thousand dollars or in any sum, or that the plaintiff was thereby compelled to or did lay out or expend for any doctor or medical attendance $105 or any sum whatever.

And the defendant alleges that if the plaintiff sustained any injuries or damages whatsoever the same were caused and occasioned solely by reason and because *if* his own negligence and carelessness in driving into and remaining in a dangerous place, knowing of the danger, and in negligently and carelessly failing to observe the approach of the cars referred to in the complaint when the means and opportunity of observation were open to him, and in not removing himself from the place of danger, and after he knew of the existence thereof and after he had been warned thereof, and not because or by reason of any negligence or carelessness on the part of the defendant, its officer-, agents, or servants.

8 And for answer to the second cause of action alleged in the complaint denies that the plaintiff was at the time or place alleged and referred to traveling with his team of horses and wagon or otherwise traveling on the alleged or any wagon road provided by the defendant to be traveled in the business al-eged or otherwise, and denies that at the time or place alleged or at any time or place or under the circumstances alleged or under any circumstances whatever the defendant carelessly or negligently caused or allowed a train of cars or any cars to approach the crossing referred to or the place where the plaintiff was engaged as alleged or otherwise or negligently or carelessly caused or allowed the same to pass rapidly or otherwise over the track of said railroad or negligently or carelessly omitted its duty in the respect alleged or otherwise or failed to give any signals or warning whatever of the approach of said cars or negligently or carelessly failed to stop or slacken the speed thereof, or that by reason of any of the negligence

or carelessness alleged in the complaint or of any negligence or carelessness whatever on the part of the defendant the plaintiff without fault on his part or otherwise was unaware of their approach or the cars aforesaid struck or otherwise killed or injured one of the plaintiff's horses, thereby or otherwise damaging the plaintiff in the sum of $150 or in any sum whatever, or that said horse was of the value of $150 or of any value in excess of $90 or struck or broke or destroyed or otherwise injured plaintiff's said wagon or thereby or otherwise damaged the plaintiff in the further sum of $115 or in any sum, and denies that the said wagon was of the value of $115 or of any value in excess of $50.

And the defendant alleges that if the plaintiff sustained any injuries or damages whatsoever the same were caused and occasioned solely by reason and because of his own negligence and *and*
9 carelessness in driving into and remaining in a dangerous place, knowing of the danger, and in negligently and carelessly failing to observe the approach of the cars referred to in the complaint, when the means and opportunity of observation were open to him, and in not removing himself from the place of danger after he knew of the existence thereof and after he had been warned thereof, and not because or by reason of any negligence or carelessness on the part of the defendant, its officers, agents, or servants.

All the foregoing allegations and denials are made on information and belief.

Wherefore the defendant prays judgment against the plaintiff that the plaintiff take nothing and that the defendant be hence dismissed with its costs.

BENNETT, MARSHAL & BRADLEY,
Attorneys for Defendant.

10 UTAH TERRITORY, } *ss:*
Salt Lake County, }

A. E. Welby, being first duly sworn, on his oath says: I am an officer, to wit, the superintendent, of the defendant company herein. I have read and know the contents of the foregoing answer, and same is true of my own knowledge except as to the matters therein stated on information and belief, and as to those matters I believe it to be true.

A. E. WELBY.

Subscribed and sworn to before me November 18th, 1891.

[SEAL.] THOS. TIPTON,
Notary Public, Salt Lake County, Utah.

(Indorsed:) 9898. 3rd dist. ct., Utah. Frank Leak, pl't'ff, *vs.* Rio Grande W. R'y Co., def't. Answer. Copy served on us in due time, Nov. 19, 1891. Powers & Hiles, pl't'ff's att'ys. Filed Nov. 18, 1891. Henry G. McMillan, clerk, by George D. Loomis, deputy.

11 In the District Court of the Third Judicial District, Territory of Utah, Salt Lake County.

FRANK LEAK, Plaintiff,
against
RIO GRANDE WESTERN RAILWAY COMPANY, Defendant. } Verdict.

We, the jurors impaneled in the above case, find the issues for the plaintiff and assess his damages at the sum of $13,370.00, thirteen thousand three hundred and seventy dollars.

Dated November 25th, 1892.

JAMES W. PITTS, *Foreman.*

Filed November 25th, 1892.

H. G. McMILLAN, *Clerk.*

12 In the District Court of the Third Judicial District, Territory of Utah, County of Salt Lake.

FRANK LEAK, Plaintiff,
against
RIO GRANDE WESTERN RAILWAY COMPANY, Defendant. } Judgment on Verdict.

This action came on regularly for trial. The said parties appeared by their attorneys. A jury of twelve persons was regularly impaneled and sworn to try said action. Witnesses on the part of the plaintiff and defendant were sworn and examined. After hearing the evidence, the argument of counsel, and instructions of the court, the jury retired to consider of their verdict, and subsequently returned into court and, being called, answered to their names and say that find a verdict for the plaintiff as follows, to wit:

"We, the jurors impaneled in the above case, find the issues for the plaintiff and assess his damages at the sum of ($13,370) thirteen thousand three hundred and seventy dollars.

"JAMES W. PITTS, *Foreman.*

"Dated November 5th, 1892."

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged, and decreed that said plaintiff have and recover from said defendant the sum of thirteen thousand three hundred and seventy dollars, with interest thereon, at the rate of eight per cent. per annum, from the date hereof till paid,
13 together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of eighty-four and $\frac{55}{100}$ dollars.

Judgment entered November 28th, A. D. 1892.

Clerk's office of the district court of the third judicial district of the Territory of Utah in and for the county of Salt Lake, *ss:*

I, the undersigned, clerk of said court, do hereby certify the foregoing to be a true copy of the judgment entered in the above-entitled action.

Attest my hand and the seal of said court this eighth day of December, A. D. 1892.

[SEAL.] HENRY G. McMILLAN, *Clerk.*

(Indorsed:) No. 9898. District court, third judicial district, county of Salt Lake. Frank Leak, plaintiff, against Rio Grande Western Railway Company, defendant. Judgment on verdict. Filed Dec. 8th, 1892. Henry G. McMillan, clerk.

14 UTAH TERRITORY, } *ss:*
Salt Lake County, }

In the District Court of the Third Judicial District.

FRANK LEAK, Plaintiff, }
vs. }
THE RIO GRANDE WESTERN RAILWAY COMPANY, Defendant. }

You are notified that the defendant above named intends to and will move the court to vacate and set aside the verdict of the jury and judgment rendered herein in favor of plaintiff and against defendant, and to grant a new trial of the action on the following grounds, namely:

1. Irregularity in the proceedings of the jury by which the defendant was prevented from having a fair trial.
2. Misconduct of the jury.
3. Excessive damages, appearing to have been given under the influence of passion and prejudice.
4. Insufficiency of the evidence to justify the verdict.
5. That the verdict is against law.
6. Error in law occurring at the trial and excepted to by the defendant.

The motion will be made and based on the records and files herein and on a statement of the case to be hereafter prepared and served on you, and also on affidavits to be hereafter prepared
15 and served on you and filed herein.

Dated December 5th, 1892.

BENNETT, MARSHALL & BRADLEY.
Def't's Att'ys.

(Indorsed:) 3rd dist. court. 9898. Frank Leak, pl't'ff, *vs.* Rio Grande Western Railway Co., def't. Notice of intention to move for new trial. Due service of a copy on us admitted Dec. 5th, 1892. O. W. Powers, pl't'ff's att'y. Filed Dec. 5, 1892. Henry G. McMillan, clerk, by George D. Loomis, deputy.

16 In the District Court of the Third Judicial District, Salt Lake County, Utah Territory.

FRANK LEAK, Plaintiff,
vs.
THE RIO GRANDE WESTERN RAILWAY COMPANY, Defendant. } Statement.

The above-entitled action came on for trial before said court on the 22nd day of November, 1892, before the Honorable Charles S. Zane and a jury; whereupon the following evidence was introduced and proceedings had:

PETER MADSEN, a witness in behalf of plaintiff, testified as follows:

Direct examination:

I live in Bingham Canyon. Teaming has been my business; at present I am mining. I am 33 years old, and have lived at Bingham for about two years. In July, 1891, I was teaming; was engaged in hauling ore from the Petro mine to the Rio Grande depot, and I am familiar with the tracks and grounds of the Rio Grande Western railway where they load ore at Bingham. The track of that road just east of the box car they have for a depot is commonly known among the teamsters as the main track. The next track to the east is called the ore track. There is another track to the east of that that has no separate name, and further still to the east there is a track where the tram cars load on that come down from the South Galena mine. There is a
17 wagon road between the main track and the ore track where teams drive down and unload their ore. They come down and drive across the ore track below the cars; come up on the left-hand side of the ore track as they are going up the cañon; that would be to the east side of that track. There are no other wagon tracks that are used by teamsters that come down and unload ore. In order to unload they have to come between those two tracks. I known Frank Leak and remember the accident to him. It happened on the 11th day of July, 1891, between 11 and 12 o'clock in the daytime. Teams were down unloading at that time at the depot. At the time of the accident I was on the east side of the ore track unloading ore from my wagon into a car. I should judge there were five or six cars standing on the ore track at that time, and, if I remember rightly, they were coal cars and box cars. The ore track was full of them. I was probably a little north of the middle of the ore track. I saw Leak that day. He was driving by my wagon. My wagon was facing to the north; Leak was going southerly. He went by me with a team and wagon which was unloaded. Nobody was with him. The next thing that attracted my attention to Leak was that I looked around and there was a train of cars coming down the hill, and the thought struck me that Leak's wagon was pretty close to them. I didn't think that he would have time to get out

of the way before they would catch him, so I turned around to look to see where he was, and he was driving out southerly right down the track that the cars were coming on. He was a little to the right of the track; was not noticing anything but his team. By that I mean he was looking at his team and driving ahead. I tried to hollow out to him, but I was a little bit excited, seeing the danger
18 he was in, and my tongue got tied up so that I couldn't get the words out of my mouth, and finally a coal car caught the corner of his wagon, and just as the coal car caught the corner of his wagon Leak looked around and he then took the whip and started whipping his horses, but the cars were coming so fast the horses could not get out of the way quick enough and the car that had struck the corner of the wagon carried the back end of the wagon around so fast that it crushed between the car that stood on the right-hand side of Leak on the lower track, and it crushed the wagon and horses and Leak all in a bunch between the two cars; in fact, it crushed him so tight it stopped the cars almost. I cannot say positively how many cars came down the grade, but it looked to me as if there were five or six cars. The first one was a coal car and I think the next two or three were coal cars and then there were one or two box cars. I saw a brakeman on the cars, but saw no one else. If there had been any one else I think I would have seen them. The brakeman was on the top of the box car. It looked to me as if he were looking at Leak. He was looking in that direction. I didn't see him do anything toward stopping the cars. I didn't hear the brakeman say anything at the time of the accident or just prior thereto, nor did I hear him give any signal or warning of the coming of the cars. If any such signals had been given I would most likely have heard them; still the cars were rattling considerably, as cars will when they are running. There was nothing else except that the rattling of the cars to have prevented my hearing signals and I heard no signals. No bells were rung or whistles blown. The cars were turned loose upon the grade track. The track is on the hill, and by taking the brakes off the cars they will run down themselves. After the accident I saw an engine. It was probably a couple of minutes after the wreck. I saw the engine coming down at the north end of the cars. I was then standing close
19 to the wreck and had been helping get Leak out and had succeeded in lifting the hounds off from his body so that they would not crush him. I then turned around and saw the engine coming down and hook to the cars. When Leak drove past me, as I have stated, I did not see anything of the cars that afterwards ran down the grade, nor did I then see anything of them. I cannot say whether they had then started to go down or not. Between the ore track and the track immediately to the east, namely, the track that these cars ran down on, there is a distance of about 10 feet, just room enough for a wagon to stand between and let the cars pass, but at the time I first saw the cars there was not sufficient room between the tracks where Leak then was to permit the cars passing him without striking him if he had then stopped. I have been around cars a good deal and rode on them considerably and I

work around where I have seen cars being operated. I really could not tell at what speed these cars were going that came down the grade, but they were run down at a pretty good speed. They looked to me as if they were going 20 to 25 miles and hour. They were going at a pretty lively speed and fast enough so that a team could not get out of the way. I have seen other cars run down that grade track. When the plaintiff's wagon was struck I jumped out of my wagon and ran to him as quickly as possible and was the first person there; John Barton was the next person. I saw the conductor; his name is Hill. I saw him pretty soon after the wreck; I don't think it was quite two and a half minutes after the wreck before I saw Hill standing there. I saw a man east of me on the tramway. I don't know who he was. I saw him standing on the platform there just prior to the wreck, but only saw one man
20 there. I didn't hear him make any outcry. He was probably 150 feet from me. At the time of the accident there were cars standing on the main track; a long string of them. They extended down below the depot and above it. I couldn't see how many, but there were quite a number of cars there. There is a crossing made by planks laid between the rails of the ore track to the south of the cars then standing on that track. The two roads I have referred to are the only ones that teamsters could use in hauling and unloading ore at the depot, and they were generally used for that purpose and teamsters could not get out in any other way without driving down the track. I suppose the cars were put on the ore track for the purpose of being loaded. They were generally put there by the railroad men.

Cross-examination:

I have known Leak for about two years. We were both engaged in the same business, but didn't work for the same company. We were pretty intimate and were friends. The roads I have referred to is the one that goes to the west of the ore track and the one that goes to the east of it. You can unload on the west road, but if you unload there you would have to cross the ore track to get out. You could not get out in any other way without driving away below and coming around about half a mile below. There are always cars switching up and down and it is dangerous to do that. You can drive down between the ore track and the main track, and by going quite a distance down the main track you can then cross the main track and get on the Bingham road and come south again on that. I think there is room for six cars on the ore track; that would probably be about 180 feet. The grade track is above the ore
21 track. Right opposite where my team was standing at the time of the accident the grade track was about three feet above the ore track, and at that point the distance between the ore track and the grade track, I should judge, was about 10 feet. When Leak passed me he drove on the grade track. I didn't mean to say that the grade track was three feet higher than the ore track where my wagon was standing. I was referring to the distance away. It

is about on a level. The distance between my wagon and the grade track, I should judge, was about three feet, and to go around my wagon Leak had to drive on the grade track at that point. Leak had gotten 58 or 60 feet from me when I first noticed the cars first coming down. I didn't notice the cars until they got pretty close to me; in fact I heard them rattle right by me and I turned around to see if Leak was out of the way. As soon as I noticed the cars I looked at Leak and then I looked back at the cars. A person will look pretty lively when there is danger. Then I looked at Leak again and saw the collision. I didn't say anything before the cars struck him, if I said anything at all, and I do not think I said anything at all. I was trying to hollow to him to jump. I didn't hollow to him loud enough for him to hear it. I made the attempt as hard as anybody. I kind of stuttered a little and could not get it out. I didn't ordinarily stutter. I didn't estimate the speed of the cars, but they were going at a pretty lively speed. I think it is possible that when I saw this man in danger of getting killed and could not hollow that I could at the same time form a fair judgment as to the speed these cars were coming down the hill. I saw Leak whipping his horses. I didn't notice that he had his whip in his hand as he passed me. I didn't see Leak turn around before the cars struck the hind end of his wagon. He then turned his head. After the cars struck
22 his wagon he hit his horses and probably hit them twice. I am positive that after the cars hit his wagon he hit his horses twice before his wagon was knocked over, and he didn't start to whip them before the cars struck the wagon. A man will whip pretty lively when he is in danger. I notice the brakeman was looking at Leak. I was not excited so that I could not notice these things. I had my presence of mind as much as I have now. I tried to warn Leak, but I stuttered. I don't know whether you would call it stuttering or tongue-tied or what it was. I know that I couldn't get the words out of my mouth. It must have been 20 minutes before Leak was extricated from the wreck. I could see the grade track to the north of me if I had looked for a distance of about 200 feet. There is a turn in it, and up there there are some trees in the way. Those trees were about 200 feet from my wagon. From my wagon I could not have seen the cars coming down until they got within 200 feet of me because of the trees along the track. I noticed the trees particularly, and the reason was that sometimes I would go up there to see if there were empty cars. I noticed one time that we could not see up there for the trees, so I had to go up the grade and look and see. The empty cars were stored a couple of hundred yards up the grade track, and I wanted to see whether any empties were there, and I looked up and couldn't see all the cars. Then I had to go up the track and look. I could see some of the cars, but could not tell definitely how many there were, but at the time of this accident I didn't see the cars until they got right close to me and rattled right by me. I was not thinking of cars or looking up that way at all. There is a plank crossing on the ore track at the lower end of the two tracks, and it was down the cañon

from my wagon. It was there at the time of the accident.
23 I don't know whether Leak drove over it or not. At the time of the accident Leak's team must have been about 40 feet from the junction of the grade track with the ore track. Empty cars were ordinarily stored up the grade track and were generally run down that track by gravity given them on the ore track. They were run down generally without danger, and I had often seen them run down that way. It was a matter of almost every-day occurrence to run them down without an engine and without ringing the bell or blowing the whistle.

Redirect examination:

There was a plank crossing on the ore track to the south of where the cars stood on that track and further up the cañon. The first car on the ore track, I think, was partly on the crossing. I think nearly one-fourth of it was on that crossing. The planks are about 20 to 25 feet north of the junction, between the ore track and the grade track. I cannot tell the distance precisely. The distance between the ore track and the grade track at a point where plaintiff was struck I should think was about seven feet. You would have to drive down the main track before you could drive over it into the main road and go south up the cañon as far down as Winnamuck. You would have to drive down the track a distance of one-eighth of a mile, I should judge, and you could not cross over short of that because they run the cars in there so that a team cannot turn around, and the only other way of getting around would be to drive as Leak did. You couldn't cross south of the Winnamuck because there is a deep ditch between the main road and the railroad. The plank crossing over the ore track was to the north of where I was.
The grade track begins to rise a rod or two north of where I
24 was, but where I stood it was about level; for a rod and a half east of where I was the ground was about level.

Recross-examination:

If any one unloaded on the west side of the ore track it would depend upon the place where the wagon stood as to whether they could turn around without crossing that track or not. In some places they could; in other places they could not. Leak unloaded that day on the west side of the ore track.

Redirect examination:

There is generally more unloading between 11 and 12 o'clock in the daytime than at any other time. The teamsters make two trips per day—unload their wagons and go to dinner in the morning and make another trip in the afternoon.

25 H. M. STANDISH, a witness in behalf of the plaintiff, being duly sworn, testified as follows:

I live in Bingham and have lived there since 1876. I am a freighter and ore-hauler and am familiar with the tracks in Bing-

ham Canyon of the Rio Grande Western Railway Company. The tracks there run nearly north and south as the cañon runs. The depot is on the west side of the track, and the track immediately east of the depot is called the main track. Next to the depot and to the south there is a lumber yard. The track to the east of the main track is called the ore track. Still east of the ore track there is another track, the name of which I don't know. It is a switch track, and east of there again is a spur. The track furthest to the east is a tramway track on the hill. There are three buildings between the grade track and the main track. There is a small grove of trees to the north of the building nearest the depot. I don't know the number of the trees, but there are five or six large trees. There is a wagon road between the main track and the ore track which is used to get into the switches to unload ore. There is a crossing on the main track in order to drive in on, and there are crossings on the ore track. There is one crossing to the north of the ore track and another to the east of it. These crossings are made with plank put in by the defendant company's employees and have been there three or four years. There is also a wagon road between the ore track and the switch. That road is used for unloading ore and driving on in going out of the yard. Teamsters in unloading would come in from the south going down the cañon and would unload into cars standing on the ore track. That is the usual place for them to unload in. They are sometimes crowded there and have to cross wherever they
26 can. With a loaded wagon the teamster will usually drive along the road between the main track and the ore track. After unloading there were two ways of getting out. The usual way is to drive around the end of the cars and go up the other way and out. The teams would drive between the main track and the ore track in a northerly direction and would cross over to the east, crossing the ore track. There is a plank crossing there. They would then turn to the right and go to the south between the ore track and the switch. There is a wagon road there for teams; wagons are using it every day, all the time. In going up the cañon you would have occasion to again cross the ore track, and there is a crossing there. There is another way for team- to get out. They can drive into the north end of the yard and back their wagons down by the end of the depot; then come out the same way they went in. To do this they would have to back across the main track. I remember the accident to plaintiff was near there in the yard. There were cars on the main track that day. I don't know whether they ran to the north of the depot or not. The ore track was full of cars, and it holds five cars to clear. If there had been cars north of the depot on the main track it would not have been possible for a man with a wagon and team to have turned around between the main track and the ore track, so that if there were cars north of the depot the only way to have gotten out without going a long ways around would be to drive over and across the ore track and south up the cañon, as I have indicated. West of the depot there is a creek, and it there makes a ditch about 6 feet wide and 6 feet

deep. There are no bridges across said creek nor were there at that time. There is a high bank on the left-hand side. I made
27 no measurements as to distance between the main track and the ore track, but did between the ore track and the switch. At the widest point between the ore track and the switch track there is 8 feet and 9 inches between the cars. I know the place where the accident happened, and I measured the distance between the two tracks at that point. It is there 11 feet between the rails; 6 feet 4 inches between the cars. Just prior to the accident I was standing on the west side of the main track, at the upper end of the yard and about 100 feet away. I didn't see the cars running down. The first thing that attracted my attention to the wreck was the crash. Just prior to the crash I didn't hear any bell rung or whistle blow. When I heard the crash I ran to see what was the matter and went past the cars that were obstructing my view to the place of the accident. I didn't count the cars that came down the grade track, but there were probably about five cars. There were three coal cars and a box car, and what was behind that box car I couldn't tell. The car that was farthest south was a coal car, and that car must have struck the wagon. The coal car extends about two feet over the track. I am familiar with those cars. On a coal car there are some sockets and stakes on the outside of the coal car that are not found on a box car, and that makes a coal car wider, so that it would extend further out over the track than a box car. The car on the ore track that was standing farthest to the south was a box car, and there were five cars standing on the ore track; they came very near to the crossing on that track. After I went to the scene of the accident I saw the engine; it was on the tramway track on the hill; it had been run in there so that the empties could pass by and let the engine come in on the other end of the
28 cars. When I noticed it they were standing there, waiting for the cars to pass.

After the cars had passed its next move was to back up and hitch on to the cars, and when I noticed it the engine was moving out on the switch to get in behind the cars. At the place of the accident the distance between the switch track and the ore track is 11 feet between the rails and 6 feet 4 inches between the cars. In the widest place it is 8 feet 9 inches between the cars. I don't know what distance between the rails at the widest point. At the place of the accident a wagon could not stand without being hit between the two tracks when cars were running down on the switch track. The wagons are 6 feet 2 inches wide outside from hub to hub, and it would be possible for it to stand if it just touched each car.

Cross-examination:

There have been some alterations made in the track since July 11th, 1891. There has been a change in the tramway track, but there has been no change in the ore track or the track down which these cars ran, and I think everything about them, including the crossings, is in the same condition as it was then. At the north

crossing of the ore track there is a road across the switch track, but there was no crossing put in there. The road runs down the cañon and alongside of the track where they go down for freight, but there is no plank in that track or was no plank at that time. There are some planks now. I cannot tell when the plank was put in, but it was put there within a year; I presume by the section boss and his men, but don't know. My attention was first called to that crossing within a year last
29 past and was called by the fact of my driving across it. There is a road across the ore track and the switch track at that point and from there going down the cañon, and it crosses over into the public highway, which is west of the railroad yard, just south of the old Winnamuck dump and between the depot and that dump. That is a practicable road for teams, and it was there at the time of the accident. From the crossing over the ore track to the Winnamuck dump is 500 to 600 feet. The county road is west of the depot and does not run through the railroad yard at all. The roads in the railroad yard are not used except by haulers or people coming there to load or unload freight; at least I never saw any one else use them. These roads in the yard have not been made by work. They have been made simply by teams traveling over them. The bridges, of course, were put in. Bridges have been put in at three points. The grade track proceeding to the north is on an ascending grade and rises above the other tracks. The other tracks going to the north are going down the cañon and fall to the north. The consequence is that the grade track is ascending when the other tracks are descending. A team could stand between the ore track and the switch track while cars were coming down the switch track, but could not stand safely at the point where Leak was hurt. Farther to the north they could stand with safety and frequently do stand. When Leak was caught he had gotten just about far enough to the south to be caught. If his wagon had stopped at almost any point to the north of where he was hit, there would have been room between the cars for it to have escaped. If any of the cars were standing on the main track north of the depot, it would have been impossible for a team driving between the main track
30 and the ore track to have turned around between those tracks or to have backed across the main track. One car north of the depot would have prevented it. I think it is about 200 feet from the depot to the junction of the ore track and the main track to the north of it. The morning of the accident I had been around the depot, and I don't know how long they had been switching there prior to the accident. I hadn't taken any notice of time at all. The train is due there at 10.20 a. m. at the present time. I don't know exactly the time they were running on at that time of the accident, but I presume the train then came in between 10.20 and 11 o'clock in the morning. I think the accident was about 11 o'clock. According to the ordinary custom of the men in managing the train and the usual mode of work around there, the train had been in a few minutes before the accident, but I don't know the

time at all and I have no recollection on the subject. I have known Frank Leak about two years and have known him as a man working there at the depot all the time, teaming in Bingham. I was always with him once or twice a day or more. During the entire time I knew Leak he had been hauling around the depot, and for about a year prior to the accident he had been hauling around the depot and been constantly in the vicinity during that time. After the cars struck Leak they went three-quarters of a car-length beyond the place of collision before they stopped. The hill track or grade track is used for the purpose of making switches in order to get the locomotive from one end of the cars to the other. The locomotive will push the cars up the grade track, then uncouple and go in on the tramway switch and let the cars run down ahead of it, then come up behind them. It is in constant use for that purpose, and it was usual to make the switch every day, because the cars were
31 ordinarily suffered to go down by gravity. Then the locomotive would come in behind the cars. The yard there is very small and crowded and there is switching there, of course. They always switch once a day. Immediately after they came in in the morning they would start to do their switching and switch until they got through. The yard being contracted is due to the narrowness of the cañon, and every available spot there is built upon and occupied by something. The engine was not pushing the cars at the time they struck the wagon, but they were running by gravity. The cars could not have run by gravity more than two or three car-lengths farther than they did before they would have been stopped. The grade is so steep that they could not run very far. The grade gets steep as soon as the hill or grade track strikes the switch track, and it is up hill from that point going south. The grade track is up hill to the north; the switch track to the south. The cars come down the hill track by gravity and then strike the switch track and strike a different grade and commence going up.

Redirect examination:

The grade track bends and runs to the northeast; it runs nearly straight for a short distance and then turns north. The bow or bend of the track is to the east. I don't know what distance a man driving across the ore track with a team could see up the grade track, but he could see up to the curve and to the trees before mentioned by me; I should say about 150 feet. He could not see as far as the point where the tramway track switches off from the grade track. Houses and trees would prevent. The trees and houses are between the main track and the grade track. The trees are cottonwoods; the foliage and leaves heavy. The accident hap-
32 pened about 11 o'clock in the daytime, and that is about the time when most of the teams are in the yard. There were probably 15 teams engaged in hauling ore at that time. The bridges and crossings on the track were put in by the railroad company.

Recross-examination:

I do not think that if a train would go south from the intersection of the switch track with the ore track and proceed further south up the cañon that they could then see farther up the hill track. There are no trees anywhere only in the one place, and there are no trees at any place except on the west side of the hill track; but going farther south along the switch track I think you are just in line with the same trees, the farther up the track you get. The distance I gave that you could see up the hill track is just an estimate; I never measured it. I live in one of the houses referred to and the trees belong to me.

33 JOHN FITZGERALD, a witness of behalf of plaintiff, being duly sworn, testified as follows:

I live in Bingham, and have lived there since 1876. My business is teaming and mining. I was teaming in Bingham in July, 1891, and am familiar with the tracks and grounds of the Rio Grande Western Railway Company at Bingham Station. The tracks there run about north and south. There is a track—there is a track which is called the main track to the east of the box car called the depot. The track east of that is known as the ore track. The next track east of that is known as the switch-off towards the tramway. The track running to the north from this switch track is termed out there as the Winnamuck switch. I didn't make any measurements of the distance between the main track and the ore track. I was present and assisted in making measurements between the ore track and what is known as the switch track. I believe the distance at the widest point between these two tracks is in the neighborhood of 11 feet. We made measurements at the point where the accident occurred. Between the tracks at that point is in the neighborhood of 9 feet, I think, between rail and rail. Between the junction of the ore track and the switch track to the north and the junction of the ore track and the switch track to the south I did not measure accurately. I stepped it off several times, and it is in the neighborhood of 220 to 225 feet. The track I called the Winnamuck track runs on a grade. It starts pretty near the north, but there is quite a bend in it. The bend in it is toward the east. There are boards across the main track, the ore track, and the switch track for a crossing. The boards on the main track are on the upper end of the yard—the south end. There are 1 or 2 crossings on the ore track. There is a crossing to the
34 north of the ore track near the junction of the ore track and the switch track where there are boards laid for teams to cross on. The driver of a team passing over the ore track and coming in sight of the Winnamuck switch could not see clear up the switch, the whole length of it, because there are trees and houses in the way. Those trees and houses are between the main track and the Winnamuck switch. There were 3 houses there at this time, and quite a few trees in a man's yard. I couldn't say for certain how many trees. Passing over the ore track with a team, the driver

going in front of the Winnamuck switch could probably see up it 100 to 150 feet. The accident to plaintiff occurred July 11th, 1891. There may have been 10 or 12 teams hauling ore that day there. These teams generally make two trips per day, getting there in the morning between 10 and 11 o'clock, and make another trip in the afternoon, getting back in the evening. Ore is unloaded on the ore track. Teams come down the cañon and drive alongside of that track and unload, and in doing so they cross the main track. They unload generally at the handiest place they can for the car; sometimes on the east and sometimes on the west of the ore track. They cross the main track south of the depot. After unloading they drive down across the ore track, turn around and go south, and go out the same way they come in. If the main track is not filled so that they cannot get in there they can back on that track and turn around and go out between the ore track and the main track, but it is not very often that that track is not filled up. At the day of the accident and just prior to the accident I had been there with a team, and there must have been four or five cars on the main track, some of them extending north of the depot—probably three or four cars north of
35 the depot. On the day of the accident I was hauling ore. I saw Leak on that day; he was unloading his load of ore. I finished before he did. I drove around the same way he did, put my team up, and was coming up the track when I saw the cars running down the hill. At that time I saw Madsen on the east side of the ore track unloading ore. When I saw the cars I did not see anything of Frank Leak. If at that time Leak had been to the north of Madsen I would have seen him. I was going in that direction, and my view was such that I could have seen him. Those cars came down the grade. There were 4 flat cars and two box cars. At that time I was in front of Tom Mayne's house, between Tom's and Standish's. I had a perfect view of the cars after they passed Mayne's house. I was going up the same way they were running; they were running to the south, and I was going to the south. After they passed I had a good view of them. The flat cars were in the lead. These flat cars are coal cars. When they came down the grade track there was no engine on them. I saw the engine at that time. It was upon what was called the tramway track. I have been around where cars were being operated; have ridden on cars. Making a rough estimate of the speed of these cars as they came down the hill, I should say they were running at the rate of ten miles an hour. I saw a man on the cars; he was on the box car—I believe the rear end. The first thing I saw him doing he was winding up the brake. That was after the car had struck Leak's wagon. I didn't see the brakeman before that time. As it struck the wagon I saw him working at the brake. I soon proceeded to the place of the accident. The wagon was in between the two cars. It was broken. It was between
36 the car that struck it and the box car that stood on the ore track. The first I saw of Leak he was under the wagon, and they were trying to get him out. It took from 20 to 25 minutes, I

think. There were quite a number of people assisting. One of the horses was tied up between the box car and a flat car and facing the wagon. He was alive when, but was killed afterwards. The other horse was tangled up in the wreck, too. I don't know how he did escape, but I guess he got out all right. I couldn't say. There was no bell rung when the cars were running down the track nor whistle blown, and I heard no signals of any kind given.

Cross-examination:

I have been teaming in Bingham for the last eight or ten years. I said it was, approximately, 11 feet between the tracks at one point. I wouldn't be exact as to the number of inches between the tracks. Mr. Porter measured it and he and I were only two present. Standish was not there. Mr. Porter measured it with a ruler, a two-foot rule, I believe. I claim that at one point it was about 11 feet between the tracks. It would not vary from that as much as a foot. At the place where Leak was hurt it is in the neighborhood of nine feet between the tracks. I guess I couldn't be mistaken two feet at that point. I didn't hear Mr. Standish's evidence when he said he measured it at that point and found it just 11 feet between the rails. At that point the two tracks are not so widely separate as they are farther to the north: and if at that point there is 11 feet between the tracks, going farther to the north there must be considerably more. I know it is not 11 feet between the tracks at that point. I was with Porter when he measured it there. When I stated that from the same point on the ore track a man could see up the grade track 100 to 150 feet, that was simply an estimate. I didn't measure it. The point referred to was about at the junction of the
37 Winnamuck track with the switch track. As you proceeded farther to the south from that point I guess you could still see farther up the grade track. Of course you could see still farther up, and from any point south of the intersection of the switch track with the grade track the trees would not intercept the view of a person looking up the grade track; but from a point north of the intersection the trees would intercept the view, and this would also be true of the houses. When you went south of that intersection the houses would not be between you and the track at all. Madsen was unloading some place in the middle of the track pretty close to the intersection of the grade track with the switch track. When I saw the cars coming down the grade track I was coming up the main track going to the south. I saw Madsen. His horses were turned down the cañon. He was unloading from his wagon into a car. He was facing the north, shovelling into the car on the west of him. At that time there were four or five cars, I should judge, extending on the main track to the north of the depot. What called my attention to the number of cars standing on the main track at the time of the accident was that while the teams were there I was looking out for myself and my team. The fact that they were switching around caused me to look out for myself and my team. I knew that was a time that they were ordinarily switch-

ing. Just as soon as a train came into the depot they went to do their switching, and they did that every day. They were in the habit of backing their empty cars upon this Winnamuck track, throwing the engine in on this tramway track and letting the cars run down beyond the engine, and as a teamster there I knew it and was looking out for myself and my team. While they
38 were not switching on the main track at this time, the fact that the cars were standing there was impressed on me because while I was loading they switched the loaded cars on that track in order that they might do their switching on the other track. They had been switching around there that morning from one-half to three-quarters of an hour; I can't just remember the exact time, but it was some considerable time constantly occupied with switching from one track to another. When I saw the cars they were past some of the houses. Tom Mayne's house is the one standing nearest to the switch, probably 100 to 125 feet north of it, and they were just passing there when I saw them. What called my attention to it was the noise they were making. The cars were rattling like cars would naturally let down off the hill. You could hear them some little distance, I guess. From the place where I first saw the cars, opposite Tom Mayne's house, to the place where Leak was hurt must have been 300 feet or more. All of that 300 feet the track had been changed somewhat since Leak was hurt, but the only track that has been extended in a southerly direction is a track that runs southerly parallel with the tramway track and up to a chute. There has been no change in the track that the cars came down on that collided with Leak, and the only change has been that the switch has been replaced there so that the -hole rail moves on a switch. The tracks have not been moved farther apart or closer together, and if there had been any change I would have noticed it, I guess, and I have not noticed any change except the fact of the switch being different. There was a switch there before, but they have put it in now so that they move the whole rail instead of one side. I think the
39 crossings are in the same condition as they were when the man was hurt. There is a road right down the cañon crossing over the ore track and what has been called here the switch track and passing down to the east side of the main track until you come just south of the old Winnamuck smelting dump, and then crossing over just south of that dump into the public road on the west side of the gulch and going up the cañon in that way. It has been used for the smelter more than anything else, and I guess it is a crossing for teams.

Redirect examination:

On the day of the accident there were 4 or 5 cars standing on the ore track. Between the crossing on the ore track on the north to the crossing on the ore track on the south is in the neighborhood of 230 to 240 feet. If a person was to the south of the junction of the switch and the Winnamuck track, and supposing that the cars had been run to the north of the Winnamuck switch and west of

the tramway switch, such a person would have to be up the track or south quite aways to see such cars. The Winnamuck track goes on the *the* hoisting works a distance of about 500 feet north of the switch connecting it with the tramway switch. If cars had been run up that Winnamuck track for two or three hundred feet and a person was to go south, going up the cañon south of the junction of the switch track with the Winnamuck track, I think he could see the cars. He might be in a direct line with those houses and trees; I couldn't say for certain. I know*n* where Frank Leak was hurt.

Q. Supposing now the cars has been run up two or three hundred feet from this point, the tramway switch, up towards the Winnamuck hoisting works, could a person then standing where Frank Leak was hurt see those cars?

40 A. Well, not very well he couldn't; no.

Q. How?

A. He couldn't see them; no.

(Witness continuing:) The houses of Tom Mayne and H. M. Standish are to the north of the junction of the ore track and the switch.

Recross-examination:

There is no difficulty in standing at the junction of the Winnamuck track and the switch track and looking up to the top switch on the Winnamuck track—that is, in looking up to the switch that throws the engine in on the tramway track, and in upon the south of that union on the switch track you can see equally well up to the top switch if you are standing on the track, but from a point west, between the switch track and the ore track, you couldn't see equally well. The trees and the turn in the road would interfere. The switch comes before the bend in the road and that bend is not north of the top switch—that is, north of the switch that throws the engine in on the tramway track. The road is on a turn from the time you leave the tramway switch. The north switch, or the tramway switch, is on a higher elevation than the point of union of the Winnamuck track with the switch track and more easily seen from the surrounding country to the south because it is higher, but you could not very well see it from any point to the south of the connection of the Winnamuck track with the switch track because of the houses and the turn. If they were out and the track was straight, you could see it. There would be nothing that would come between the eye of a man standing to the south of the union of the Winnamuck track with the switch track and the switch on the hill connecting with the tramway track. No house comes

41 between, and drawing a straight line from the man to the top switch there would be no house intersecting. There is nothing but the turn in the road that I can see that would interfere with it. A man cannot see around a bend. Standing between the ore track and the switch track and looking to the north I couldn't see the top switch at any place between the places where Madsen was standing and where Leak was hurt. I know that be-

cause I looked several times. I have looked up there time and again. I looked up there the day before I came to town, but I didn't look up there in order to see whether I could see it. I am employed on the tramway and we have to handle the switches. I was looking for cars, but was not looking for the switch nor was I looking to see whether or not I could see it, but I was looking to see whether or not I could see it, but I was looking to see whether I could see cars that were stored north of the switch and I could see the cars that were a little distance north of the switch. I was up on the tramway track. That is not the only time I have looked to see whether I could see the switch. I don't know that I ever looked up the Winnamuck track to see how far I could see to the north, standing between the ore track and the switch track.

42 ELY S. PORTER, a witness in behalf of the plaintiff, testified as follows:

I live in Bingham, and am carpenter by occupation. I know the plaintiff, and am familiar with some of the tracks of the Rio Grande Western Railway Company. The middle track is the ore track. The one east of it is the switch track. I was in the neighborhood at the time of the accident, and was standing near the crossing over the main track in the southern portion of the yard. This was the crossing which teams made in going to the ore track and south of the depot. I didn't see the cars coming down the grade before the wreck occurred. The first thing that called my attention to it was a crash. A car was standing between me and the place of the accident. There were four more cars on the ore track. I then went immediately to the scene of the wreck. I found the car that had come down the switch track and struck him. It moved about 10 feet after I got there. I hollowed to the man as I supposed on the car. The wagon was all being ground up. It was down between the car that came down the switch track and the car on the ore track. I should imagine that the car had hit the hind end and twisted it around between the cars and jammed in the horses and wagon. Leak was underneath it all, and when I got there there was still a grinding. The cars were still moving. It couldn't have been but a trifle of time before they stopped moving. They may have gone eight or ten feet when I got there. They were just moving; kind of wedging things in. I should think the wagon stopped the momentum of the cars. I think after I hollowed there was somebody putting on the brakes.

43 Q. You directed the man on top of the box car?

A. I hollowed to him, "For God's sake, stop the car!"

(Mr. MARSHALL:) Wait. We object to that as hearsay.

(Mr. POWERS:) Wait. I think that is part of the *res gestæ*.

(The COURT:) I am inclined to think that would be proper if it was at the time.

(Exception by the defense.)

(WITNESS:) It was at the time—just the minute I got there.

(The COURT:) When the cars were moving?

A. Yes, sir.

I called to him, "For God's sake, stop those cars!" He started to stop them with the brakes. I was one of the first there. I didn't examine Leak's injuries because he was apparently lifeless. I saw him and saw him carried out and after we got him out, but I could not tell what his injuries were. One of the horses were injured. Once after the wreck I made measurements to ascertain the distance between the sides of the cars at the point of the wreck. George Leak was with me, if I recollect right. I didn't make measurements of the distance between the sides of the cars at that point, but I did make such measurements between the tracks at that point. The distance between the rails at the point of the accident was 11 feet. The box car projects over the track two feet and one of the coal cars two feet and, I think, four or five inches. I would be willing to swear to two feet four inches. The stakes are on the outside of a coal car. That would make a total of 4′ 4″ projection. That would leave 6′ 8″ of space between the sides of the cars. The width of Leak's wagon from hub to hub
44 was 6′ 4″. The widest point between the ore track and the switch track is 14 feet between the rails. As you approach the crossing of the ore track from the scene of the wreck the space between the ore track and the switch track narrows. If the team was being driven to the south the space where the horses stood would be narrower than where the wagon stood. From the south crossing on the ore track to the point of the wreck I should judge was somewhere in the neighborhood *od* forty feet; not to exceed that, anyway. The train on the ore track extended south beyond the wreck and beyond where the heads of the horses would be at the time of the wreck, so that on the west side the horses and wagon were fenced in by the train on the ore track. There were four or more cars on the ore track; at least four. Five fills the track from crossing to crossing. I don't know how far it is from crossing to crossing, and I cannot locate the north crossing on the ore track, but I do know that the ore track holds five cars, and that when five are on it it is filled. I am familiar with the Winnamuck switch, and I made measurements to ascertain what the grade is from Winnamuck switch at Standish's house to the point of the wreck. It is $1\frac{1}{2}$ inches to one foot and 20 — $1\frac{1}{2}$ inches to 1 foot. That would make an average of $1\frac{3}{4}$ inches to 1 foot and would be something like 1 foot fall to the 100 feet. I cannot state the distance from the Winnamuck switch opposite Standish's house to the point of the wreck, but it wouldn't exceed 200 feet and would be in that neighborhood, I think. The switch track rises to the south from its intersection with the Winnamuck track, but between that intersection and the point of the wreck it does not rise anything to
45 speak of, and the momentum of the cars coming down the Winnamuck switch would carry cars on up the grade to the south. Between the ore track and the main track at the point of the accident is 22 feet and 5 inches between rails. I don't know how wide it is at the widest place. The widest place might be 6 to

10 feet wide. From where I was I couldn't hear the cars before the crash. I didn't hear any whistle blown or bell rung. I had to run 30 feet before I could see the wreck, and when I got around the corner, after running thirty feet, the cars moved 8 or 10 feet, and I was not to exceed 40 feet from the wreck when it occurred. A man driving along the east side of the ore track, looking in the direction of the Winnamuck switch, might see the cars coming down the Winnamuck switch at about Tom Mayne's house. It is the grade that goes up that partly obstructs a man's eyesight from seeing further up the grade. The Winnamuck switch starts on a level with both the ore track and the switch track and then gradually rises. At Standish's house the Winnamuck track might be 8 or 9 feet higher up. If cars were 150 feet north of Standish's house on the Winnamuck track and a man was unloading ore on the ore track, I don't think he could see the cars. The Winnamuck track gra-ually rises to the northeast perhaps 200 feet from the switch. It is on a steady grade. Of course, if a man don't measure things he cannot be accurate.

Cross-examination:

The distances I have given on this point are not from measurements, but simply estimates, and as to how far a man might see to the north is simply an estimate. I have not measured it nor made any test to ascertain. From the point right about opposite Tom Mayne's house where I stood the cars could have been seen. To
46 the point where Leak was hurt I should say was 100 to 150 feet, but I am not able to state from my recollection what the distance would be. I was talking to Mr. Standish at the time of the wreck. Neither of us could see the accident from where we stood. I should say the cars moved beyond Leak after he was struck about three-quarters of a car-length. It is the body of the car that projects over the track. I don't know how high above the ground the body of the car is. I wouldn't swear on the question, and I don't know how high the hub of a wagon is above the ground. I have some judgment about it, but when I say I don't know, I don't know. The hub of Leak's wagon might be two feet above the ground, and that hub would pass under the body of the car. In measuring Leak's wagon I measured from hub to hub, and the hub projects beyond the body of the wagon. The hub projects four or five inches beyond the rim of the wheel on each side. I used a level and a rule in measuring the grade of the hill track. The length of the rule was two feet. The level was perhaps 24 inches, the same as the rule. No one assisted me in it. I didn't measure the grade of any of the tracks. There is comparatively little rise to the south from the point where the hill track comes into the switch track up to the point where Leak was hurt. It is very little rise, almost the grade of the main track. As far as I could judge from my eye I should say there would not be much grade, and so there would not be much to stop the force of the cars or check the speed acquired on the hill track. If the speed was lessened at all it would

have to be lessened by something else than the grade, and after they struck Leak they moved for three-quarters of a car-length. They were still moving up the grade after I had run 30 feet, but only did move up to the time they came to a full stop, three-quarters of a car-length past the
47 place where they came into collision with Leak. There were three flat cars and then one or more box cars. I could see one box car, and I don't know what was beyond it. The brakeman applied the brake on the box car when I called out to him. The cars only moved 8 or 10 feet after I got there. Standish went up to keep them from moving the cars after we had heard the crash, as if they were moved it would set the wreck moving again. They were switching around there, and he wanted to put an end to the switching until Leak could be removed. They had been switching around before the accident quite a few minutes, I should judge. I had not been there except about five minutes talking to Mr. Standish. I had just come down, but I did notice the fact that they were switching. I didn't observe whether there were any steps or devices on these cars by which trainmen get on or off. There usually is such devices both on the end and side, which consist of a strap of iron coming down in order that a man may put his foot in, so that a man can reach it off the ground. That strap stands plumb with the body of the car beneath it.

48 FRANK LEAK, being duly sworn as a witness in his own behalf, testified as follows:

I reside at West Jordan; am 28 years of age, and am the plaintiff in this case. Before the accident mentioned my business was teaming and hauling ore from the Rough and Ready mine to the Denver and Rio Grande depot. I had been so engaged for about a year and a half. The depot is situated in Bingham Canyon. The wagon was owned by myself. I bought it. I bought the horses also and owned them. I owned the harness. The horse that was killed was worth $150. The wagon was broken all to pieces. The wagon was worth $115. The cars that I loaded ore into were situated on what they called the ore track. In coming down from the Rough and Ready mine I would pass on the west side of the main track and would cross over that track on a plank crossing. That was the usual place of crossing that track for the people who came down with us. That was at the south end of the yard. I usually unloaded my ore on the west side of the ore track, but the east side was also used at times. On the day of the accident there were 11 or 12 or maybe more teams engaged in hauling ore down to the ore track. I made two trips per day and would arrive in the forenoon from 10.30 to 12.00 o'clock. The teams that were hauling ore would come down at different times. Some mines are closer, and the closer the mines the earlier the teams would come in. The majority of the teams were there between 10.30 and 1.00 o'clock and then again in the afternoon. Whenever a car was empty the first teamster would take it. That was the custom. After I had

unloaded I drove around the end of the cars and half turned around the end of the cars and went out the same way I cam- in. I had seen other teams drive in that same man-
ner, and there were crossings laid there and a driven
49 track or road that people had used. On the day of the acci-
dent I came down with a load of ore about 11 o'clock; my partner was with me. He unloaded his wagon first; we both unloaded it. He had to get it fixed. He went to the shop and I stopped and unloaded mine. It took me about three-quarters of an hour after I got down to unload. The car I unloaded into was about the third car from the north end of the ore track and would be standing a little toward the south from the center of the curve. After I had unloaded I started to drive out south. In order to drive out I had to turn around. The reason I could not have driven just as well out of the north end was that it was a long ways out of the road and the usual way was to go south. I never used the other road to drive out at any time. The teams usually turned around where I did and went to the south. The road I drove on was the one always travelled. After I got turned I drove along up the track. I didn't hear any noise until the cars were right close onto *to* me. I was in the usual travelled way. When the cars got close onto me I heard the rattling of the cars. I don't know what I did then. The cars were right close onto me. I don't know whether I stopped or hit the horses or what I did. I remember the cars striking the wagon and throwing me to the ground, and I remember everything after that. All I know there was a wheel of a wagon stood on my leg and a car on top of it. I couldn't say how long it stood there. The next thing I remember is that they pried the wagon off me. I was then taken to Mr. Mayne's house. I hadn't heard anything until the cars crashed into me. The whistle had not blown nor the beel rung. I wasn't doing anything differently than I had in hauling ore there for the past year and a
half when I was hit by the cars. I stayed at Mayne's house
50 three-quarters of an hour; suffered pain there. Previous
to the accident I had been in good health. Both of my legs were all right. I was able to earn $3 per day with my own team. My services were worth $3 per day independent of the team. After leaving Mayne's house I was taken to Bingham Junction first. I stayed there, I suppose, three or four hours, nobody taking care of me. My leg was all smashed up. I was there several hours and then brought to Salt Lake on the Rio Grande Western train. I was then taken to Salt Lake and to the Sisters' hospital and was attended by Dr. Pinkerton. My leg was taken off. That was done probably an hour and a half after I got there, on the same day. I was laid up in the hospital three weeks the first time and eight weeks and four days the second time. After leaving the hospital I was not able to go ahead with the business I usually followed. I don't know how many cars came down on me. I saw them five or ten feet before they struck me. I couldn't say how close they were. I asked the doctor what his charges were. He said $75, and I was to pay the hospital if I could and pay him if I could.

Q. You told him you were a poor man?
A. I told him I was a poor man.

(Mr. MARSHALL:) I object to that as irrecelant.
(Mr. POWERS:) I withdraw it.
(Mr. MARSHALL:) It's all very well to withdraw a question after counsel gets it before the jury.
The COURT: Let it be excluded.

(Witness continuing:) I paid the hospital fees the first time. It was $30. I didn't pay it for the second time. It was eight weeks four days at $10 per week. When I drove around the cars
51 on the ore track to the north I looked to see if there were any cars on the track. I didn't see any. I looked and listened. I say the engine. It stood very nearly right straight from where I got caught on the tramway track. It was on the Winnamuck track. I saw no cars on the Winnamuck track and I didn't hear any coming.

52 Dr. S. H. PINKERTON, being sworn as a witness in behalf of plaintiff, testified as follows:

I am a practicing physician and surgeon in this city; have been such in this city nearly six years. I have been a physician and surgeon nine years. I know the plaintiff. I have treated him for his injuries. He had a compound fracture of the leg down close to the knee-joint. I amputated his leg. The injury necessitated amputation. Amputation was absolutely necessary in order to save his life. The fracture was below the knee, but approached the knee.

FRANK LEAK, being recalled for further cross-examination, testified as follows:

I had been teaming in the vicinity of the depot in question about a year and a half prior to the accident, going to the depot usually twice a day, coming to the depot about the same time in the morning that I came on the day of the accident. On the day in question I think the train got to the depot about 11.00 o'clock, and they had been there about three-quarters of an hour before I finished unloading. It was the custom of the trainmen after getting in in the morning to do the necessary switching. That is what my observation had taught me. The ore track was full when I unloaded, and I unloaded on the west side of the ore track, between the ore track and the main track. I then drove to the north, crossed over the ore track, and started to the south between the ore track and the next track east of that. When I first
53 looked up the grade track or the Winnamuck track I think I was a little north of Mr. Madsen. I cannot say whether Mr. Madsem was unloading at the car farthest to the north on the ore track or not. When I looked up the Winnamuck track I saw nothing. From that time until I found the car within five or ten feet of me I drove on south. After I started to drive south I looked at the engine. It was standing upon the tramway track. In going

south I looked to the left of me. The Winnamuck track would be behind me and would be to the north, almost directly behind me. After I first looked up the Winnamuck track and before I found the cars within five or ten feet of me I turned around to look up the track again. The first thing that called my attention to the cars when I found them within five or ten feet of me was the rattling of them. I was driving on a fast walk. The wagon was rattling. I guess that it was rattling so much over the ties and the rails as to drown the noise of the approaching cars, and it was rattling a good deal over the ties. There were no ties between the two tracks, but in order to get around Mr. Madsen I had to drive on the track. I couldn't say how soon I pulled off the track again, but I did pull off. My wagon was empty. I have not an idea how long it took to drive from the place where I looked up the Winnamuck track for the first time until I was struck. I looked up the Winnamuck track to see if my way was clear; in other words, to see whether the cars were coming down it or not. I didn't expect the cars to be coming down the track nor did I see them.

Q. Did you expect them before you saw them? Did you look up there expecting that perhaps they might be coming down the track?

54 A. Well, I thought they might be; yes.

Q. Why did you think so?

A. I was looking out for the cars.

Q. What reason had you to think that the cars would come down that grade track?

A. I didn't have any reason.

Q. None at all? Wasn't it customary for them to run cars down that track?

A. Yes, sir.

Q. And to throw the engine in on the tramway track so as to let the cars pass the engine?

A. I couldn't say how they done it there at all.

Q. You had seen them do it one hundred times, hadn't you?

A. Well, no, sir; I never noticed them. I never noticed how they done it.

Q. Yet you had seen them run cars down that track?

A. I had seen them run cars down there; yes, sir.

Q. About how many times—about once a day while you were there?

A. Oh, I couldn't say how many times a day.

Q. You knew, as a matter of fact, that they used that track in switching, didn't you?

A. Yes, sir.

Q. That is the reason you looked up it to see if any cars were coming?

A. Yes, sir.

(Witness continuing:) So far as I know, I had never seen them run cars in the same manner down that track before, but I had never noticed how they ran it. I had seen them run cars

55 down the track, but I had never noticed how they ran it, nor

had I ever seen them run unattached to an engine, so far as I noticed.

Q. Did you ever see them run down there attached to an engine in your life?

A. I never noticed how they ran.

Q. All this year and a half that you have been there you cannot say, can you, any one time that you ever saw the cars run down that grade attached to an engine?

A. I cannot say how they ran down there; that was not my business.

(Witness continuing:) I know where the South Galena chute is. A little platform was there at the time. I didn't see anybody standing on the platform nor did I notice any one standing in that neighborhood. I didn't hear any one call me. I was driving along paying attention to my team. After I saw the cars I cannot say whether I struck my team or not or whether I stopped. I guess I had my whip in my hand while driving through there. I think I had it in my hand. I can't hardly say whether it was or not; I don't remember. The team was a two-horse team. I don't think I stopped my team at all after crossing the ore track and after commencing to go south between the ore track and the switch track until I was hit, nor did I press them out of a walk. I hadn't noticed them switching around in the yard prior to the accident that particular morning.

Q. Didn't you know that they were switching?

A. Why, I knowed—I seen the engine up there; that is all I knowed about the switching.

(Witness continuing:) I hadn't noticed that morning that
56 they had been switching for some little time around there. I knew it was their custom to switch after coming in in the morning, and that was ordinarily done somewhere about that time. I didn't expect that they were switching, seeing the engine. I didn't know whether they were switching or not. I had seen the train come in; it came in while I was unloading. The wagon broken up was a new wagon. I bought it on the 7th day of July and had only had it four days. The horse killed was four years old. There is a road to the north leading down the cañon from the point where I crossed the ore track and lying east of the main track; it crosses back into the main or county road on the west side of the gulch, a little south of the Winnamuck smelting dump; it is not a practical way to drive and I never used it. Any one could use it if they wish to, and I could have used it. I would have to have gone, I should judge, about three-quarters of a mile before I crossed back to the public road. The place of crossing was just south of the Winnamuck smelting dump. It would have been three-quarters of a mile out of my road. I should say that from the north crossing on the ore track to the crossing back into the county road south of the Winnamuck smelting dump would be between 600 and 700 yards; that is an estimate of mine.

Redirect examination:

I kept my horses at Mr. Mayne's barn; that barn is up the cañon from the south end of the ore track and about 300 yards south of the depot, and if I went in the way suggested by the counsel for defendant I would have to go north of the depot, cross over into the main road, then come back south again, and around to the barn. I should judge that distance to be about three-quarters of a mile, and from the wreck to the barn would be about 200 yards. In
57 the way suggested by the counsel for defendant I would have to cross four or five tracks. Those tracks were used by the railway company at that time and running cars over them the same as other tracks. The main railroad track going to the north is nearer the houses. There is just room for a wagon to drive between, and I would have to have driven through a narrow passageway between the house and railroad track if I had gone that way and the cars were running upon that track as well as other tracks. Immediately prior to the time when the cars struck me I looked back; they were then within eight or ten feet of me, I should judge. I couldn't then by whipping my horses have beaten the approaching train.

Recross-examination:

I never passed down the road to the north when there were cars. I don't know that that road is travelled constantly while cars are passing on the track. I suppose it could be travelled with cars passing on the track. I couldn't say at that time whether there were cars being switched north of the north intersection of the ore track and the switch track or not. The tracks I would have had to cross in going to the north would have been the switch track, right near the point where I cross the ore track, and then two or three tracks down at the Winnamuck, which were right together, although I think they were separate tracks, but as close together as they could get without the cars interfering. Those crossings constituted the only crossings that would have to be made. The Mayne's stable is 150 to 200 yards west of the Bingham road and is on the opposite side of the gulch from the depot.

Redirect examination:

I still suffer pain from my injury and have from the time
58 of the injury to the present time. Pain keeps me awake at nights, twitching in my toes. I feel my leg, it feels as though it were still there when I am walking sometimes.

The crossings to the north that I have spoken of were unplanked, so that there were no crossings on the track.

Recross-examination:

While I have never used the road, I know there were no planks there, because I have been down there. I was down there about a week before the accident, when I noticed specially that there were

no planks. I was walking. Nothing called my attention to it, but I don't think there were any planks there. There was no reason why I should remember it. I am willing to swear that there were no planks there.

Redirect examination:

I live in the vicinity, at Tom Mayne's house, which is between the tracks.

Dr. S. H. PINKERTON, being recalled for further cross-examination, testified:

It has been six months since I examined Frank Leak. At the time I saw him, six months ago, he had some necrosis, and it became necessary to take another piece off the bone. After he was discharged as cured and when I last saw him there was nothing that would lead me to suppose that he would continue to suffer. In most amputations a patient complains of a little pain, and they feel the toes for some time afterwards—maybe a year—but that soon wears off. It is usually temporary. Some complain of a severe pain. Others complain simply of a sensation—that there is some pressure on the toes, but it is a matter that wears off.
59 There would be nothing in such sensations as would lead me to suppose that it would remain permanently.

Redirect examination:

Usually the cause of painful sensation in the stump is that the nerve becomes involved, becomes united to the cicatrix. In all my amputations I take particular pains to pull all the nerves down and cut them high up so that there would be no union of *of* the cicatrix. Possibly the cause of the necrosis in Leak's case was from the sore; that sometimes produces a superficial necrosis. His stump did not heal for quite a while and I was compelled to open it up and take another *peice* from the bone. I had no trouble with the nerves at this time because I had taken the precaution to cut them off one inch above the bone. I cannot say why a double operation necessitates more lasting pain than a single operation. Four or five months intervened between the two operation*a*. Leak is better able to state whether he suffered pain or not. I couldn't tell whether he suffered pain or not, but there was nothing to occasion him pain that would continue indefinitely.

60 S. E. REAUGH, being sworn as a witness in behalf of defendant, testified as follows:

I am a civil engineer and have followed that profession for 21 years.

(Mr. HILES:) I will admit that he is a competent engineer and surveyor.

(Witness continuing:) I am in the employ of the defendant company. I am its assistant engineer. I have recently made a survey

of the yard of that company in Bingham, in Salt Lake county, and the plot shown me is my work. The track that runs nearest the depot is the main track. The dotted line represents wagon roads. The full double lines are railroad tracks. The second full double line is a track that has been designated as the ore track, and the third one, going to the east, is the one that they have called the switch track. The track running off to the north from the switch track is the Winnamuck track. The track farthest to the east connecting with the Winnamuck track is the tramway track. The colored portions are the crossings that exist there. The cross-section on the plat is a cross-section on the line C D and shows the relative elevations. The scale of the map is 60 feet to an inch. The plat is from an actual survey made by me on the 16th of November, 1892. The various grades of the tracks put on the map is from actual levelling. To determine the grade we used an engineer's level, which is a levelling instrument with a telescope, an instrument that is usually used by engineers in making such surveys. No one could accurately determine the grade of a track by taking a two-foot level and simply measuring each foot; it is too short a base line. There might be irregularities in the
61 rail. A small kink in the rail would mislead a man probably two or three or four feet to the hundred. The trees shown on the plat are correctly located, and also the houses towards the north end of the yard, and the plat correctly represents the survey of the yard as made by me. The points A 2, A 3, and A 4 between the ore track and the switch track and the corresponding points similarly marked on the Winnamuck track are points where I made observations to see how far up the Winnamuck track cars could be seen. The points between the ore track and the switch track have their corresponding points on the Winnamuck track and I measured the distance between the points. Standing at the point A 2 between the ore track and switch track, I could see a car at A 2 on the hill track or Winnamuck track, and I could see a car, a coal car, there. Standing at A 3, between the ore track and switch track, I could see car at A 3 on the hill track. The same would be true as to the two points marked A 4. Nothing would intervene between such points to cut off the sight. The line of visions would pass altogether to the east of the trees and between those corresponding points of A 2 and A 3 and A 4 as marked on the map between the ore track and the switch track and A 2, A 3, and A 4 on the Winnamuck track, and you could see the cars continuously. They would not pass out of sight in going from one point to another. While I was surveying the yard I saw cars drop down the Winnamuck track without an engine from a point on the grade track marked with a little arrow-head, and it required 35 seconds to drop a car from this point to station 1, a distance of 325 feet, in the manner that they dropped it that day. If cars came down the track at a speed of eight miles per hour, the initial speed would be low, not exceeding one mile per hour.
62 They would gather speed as they went. If a train passed the house marked B at a speed of ten miles per hour it would

take 36 seconds to go 440 feet. The grade changes at station 1. From that time on the grade is going up to the south, and if the cars were controlled entirely by gravity the speed would decrease. If the cars were going ten miles per hour and maintain that speed throughout they would traverse 440 feet in just half a minute. The crossing indicated farthest north on the track to the north crossing on the ore track is 424 feet from the center to center of the crossings. At this crossing farthest north I found a road crossing the tracks going around by the old smelter dump, crossing the creek, and so into the main road, and from that crossing up to the crossing of the ore track is a travelled road. The grade of the hill track or the Winnamuck track from station 1 to station 6 is 2.6 feet to the 100. It rises that much to the north. The grade of the main track is 4.9 feet to the 100. It rises in an opposite direction. The distance between the ore track and the track next east of it at its widest point is 18.6 feet from center to center. The width of the tracks there is 4 feet 8½ inches between the rails. The point marked A 4 between the ore track and the switch track I determined by measurement to be the farthest point south between those tracks at which a wagon could stop and let the cars pass by without striking the wagon. Between the points A 4 and A 2 a wagon could stop at any point and escape, although there were cars on each side. The crossings indicated at the north end of the ore track, slanting towards the north, correctly represent the crossings as they exist on the ground.

63 Cross-examination:

A person standing at A 2 looking up the Winnamuck track could see a car a distance of 347 feet; could also see the track again a distance of 699 feet is the cars were up that far. He could see any distance less than 347 feet. He could also see the car at a distance of 699 feet and any greater than that on the switch. A person standing on the switch could see a wagon as well as the man in the wagon could see the car. If a man in a wagon was driving south he would have to look backward to see the car. The man who was operating or managing the train from the Winnamuck switch going south could see the man in the wagon unless his back was turned, setting the brakes or something of that kind. If he was watching the track ahead of him he could see the man in the wagon. If, instead of running eight miles per hour, the train was running 16 miles per hour throughout the entire distance between A 4 on the Winnamuck track and A 4 between the ore track and the switch track, the distance would be travelled in 19 or 20 seconds. I saw the cars drop down there. They were not dropped down for the purposes of investigation by me. I just happened to see them while standing there. They started to drop cars down not for the purpose of my examination from a point not 20 feet north of A 4 on the Winnamuck track. I cannot say what velocity the cars acquired in 100 feet. I just timed the whole rough. I cannot tell what the greatest velocity was; the velocity would vary. The two points were 475 to 480 feet

apart. The time required to cover that distance was 35 seconds. The brake was not entirely off, but the brakeman had some control of the train by means of the brake. If the brake had been full off and a train had started 150 feet north of the point where I saw the
64 cars drop it would have acquired a greater velocity than the train I saw and would cover the distance in a much shorter time. I saw two cars drop down. If there had been four or five cars additional they would not have acquired any greater momentum; the velocity would have been the same. There is a bend in the track to the north of A 4 in the Winnamuck switch. It begins about 40 feet beyond A 4. A person standing at A 4 between the switch track and the ore track would not have a clear and unobstructed sight any greater distance up the Winnamuck track than to A 4 on that track; that would be the longest unobstructed sight. I selected the point as being the longest sight. The distance between those two points is 485 feet. It is 300 feet from A 4 on the Winnamuck track to the switch track that joins the ore track and the switch track A 4. Between the switch track and the ore track is the farthest point south at which the cars will clear a wagon, there being cars at the same time on the ore track. Between A 4 and A 2—between those tracks is a distance of about 110 feet. A man driving to the south between those tracks could stop at A 4 and be safe, but that is the last point at which he could stop. The distance between the tracks at A 4 is 16½ feet from center to center. The distance between the sides of the cars at that point would be about 7.1 feet. I allowed just 7 feet for a wagon so as to be safe. A wagon is not that wide. I didn't measure the distance at A 2. It would be about a mean between 15.7 and 18.6 feet. I measured it on each side of that point. At A 2 the distance between the cars would be approximately 6.8 feet.

65 Between A 2 and A 4 the track widens out; between the north and south crossing on the ore track is a distance of about 210 feet. I didn't observe how far a man could see as he drove across the north crossing, looking up the Winnamuck switch—how far he could see a car. I observed each side of that crossing. He could see between a distance of 253 feet and a distance of 342 feet; probably about half way between those distances. He couldn't see farther than 347 feet and he could see more than 253 feet.

Redirect examination:

I saw the cars drop down the other day from a point 20 feet below station 5 to station 1, a distance of about 380 feet. I had not warned any one of my intention to time them coming down. I stood by the instrument; saw it was the intention to drop the cars from *from* where I was standing. I remarked I would time those cars and see how long it took to drop them down. I didn't know how far they intended to go. No one having control of the cars heard this remark of mine; they were on the top of the cars. From A 4 near the ore track to A 4 on the hill the distance is 485 feet

The cars I saw dropped, which I timed, only dropped 380 feet—about 100 feet shorter.

Recross-examination:

I ascertained from my survey and measurements the degree of curve of the Winnamuck switch at about the house. I don't remember what it was now. It was about a six-degree curve. At the northernmost house, by the Winnamuck switch, that switch is 13 feet above the level of the ore track. The curve that is north of the northern house is shown on the map and is correctly shown.

66 F. H. HOLZHEIMER, a witness in behalf of the defendant, testified as follows:

I am in the employ of the defendant railway company and have been connected with that company nearly eight years. I am familiar with the yard of the defendant at Bingham, in Salt Lake county. I remember hearing of the accident to Leak the day after it occurred. The following Sunday, a few days afterwards, I went up there. I then examined the yard with reference to the accident. That was my business. The two southern crossings were then there. I didn't go to the north crossing. I mean by the southern crossings the crossing at the north end of the ore track and the crossing at the south end of the track. What has been called here the swotch track was planked, as well as the ore track on the north. The planking did not look new, but had the appearance of having been there a little while. I didn't go down to the crossing above the old Winnamuck. I have been there since. The road between the north crossing of the ore track and the crossing just above the Winnamuck dump is a travelled wagon road, practicable for teams, and runs parallel with the track. I should judge a wagon in the center of the road would clear a box car three or four feet; perhaps a little more. The yard is in the same condition now it was when I visited it a few days after the accident, with two exceptions. Down at the lower tracks there is a switch that was put there recently. This switch does not change the distances between the tracks at all; simply the switch was changed, making it a different throw switch, but the position of the tracks has not been changed or altered at all.

Cross-examination:

67 I am now the right-of-way and claim agent of defendant and have been in the ordinary course of business representing the defendant in getting together the evidence in this suit. At the time of the accident there was no yardmaster at that station. There was an agent who had charge of the work there. His name was Lucas. A man by the name of Hill was conductor. I am unable to find out where Mr. Lucas is. He left the employ of the company some time after.

E. J. STOWE, a witness in behalf of defendant, testified as follows:

I am a conductor on the Rio Grande Western railway train at the present time, and have worked on that road for one year and six months. I have also worked on the road as a station agent and operator, and also worked as a brakeman. I was brakeman before I was a conductor. I have worked on the Northern Pacific, the Mexico Central, and Mexico National railways. I worked five years on the Northern Pacific and a little over a year on the Mexican Central and a year and a half on the Mexican National previous to coming to Utah. On the Northern Pacific I served as a brakeman first for seven to nine months before I was promoted to a conductor. I did no more braking until I came here for defendant company last summer. I was conductor on the Mexican roads. I remember the accident to plaintiff in the Bingham yard, but don't remember the date. I was then working on the Bingham branch of defendant
68 company's road; was present at the time of the accident. I was letting the cars down the grade alone. There were five cars, three coal cars ahead and two box cars behind. When I started down the grade I was on the first car, which was a coal car. When I started down I saw one man between the ore track and the switch track. He was unloading his wagon into a car on the ore track and was standing in between the track that I was to let these cars down on and the ore track, and was standing stationary. I saw the plaintiff, Leak, when he drove up the track I was to let the cars down on. The cars were then in motion, going down the Winnamuck track. I commenced to apply the brake immediately. I first set the brake on the first car. I hastened right on to the others, and I set three brakes before I hit the wagon. Those brakes were on the first three coal cars. I had no other means of stopping the cars except setting the brakes. After I struck the wagon I didn't continue to set brakes, as it wasn't necessary after we stopped to set any more brakes. There was enough set to hold the cars there and to keep them from going back. That was all that was necessary. I don't know whether we stopped as soon as we hit the wagon. I didn't feel a jar in hitting the wagon. A frail wagon wouldn't make any difference with the cars, and I didn't notice when I did hit it. I was setting the brake or else getting up on the end of the box car, and that was the next car to set the brake on. We had left the engine on the tramway track; had let it in at the switch on the hill. That was for the purpose of getting the cars on the other side of the engine, so that they might be placed in the upper end of the
69 yard. This was necessary in switching and was the customary method of switching them. There was scarcely a day while I was on the branch that we missed switching in that manner, because it was quite necessary to get the cars in position in this way. I had been working on that branch of the road prior to the accident possibly three or four weeks. I don't remember how long I had been switching in the yard before the accident that par-

ticular morning, but in order to get into the position where we were we must have made three or four switches—had possibly *had* been switching half an hour or more after arriving. We had been switching some time. Prior to the accident the engine and cars had passed along this same hill track. That was necessary in order to get up there. The engine backed the cars up the Winnamuck track; then the engine was let in on the tramway track and the cars let down. When we had passed up the Winnamuck track with the engine and cars some one was unloading a wagon on the ore track. It was only a few minutes after we had pushed the cars up the Winnamuck track that the cars came down with me. It does not take long to make a switch. It would not take more than two or three minutes. The engine in pushing the cars up the grade track made a great deal of noise; much steam is necessary. In coming down the track the cars make a good deal of noise. They were empty cars and would make more noise than if loaded. When we started down the track the brakes were turned entirely loose. I had just got the cars under motion when I saw a man drive onto the track; then I first commenced to set the brakes. I should judge that the cars were going at the very greatest speed between the time I set the first and second brake. The first brake would not have a great deal of effect on four or five cars on that grade. I don't think we were going at any time over seven or eight miles per hour. We were not going very fast. From my connection with railroads and my work on them I am capable of forming a judgment as to the speed of cars. After the collision with the wagon I don't remember any one calling to me to set the brakes. It would have made no difference if they did. I wasn't paying attention to what outside people said. I was attending strictly to business in a case of that kind, and I didn't hear anything of that kind, nor did I hear any one say, "For God's sake, stop the cars." I couldn't have paid any attention to it, because I was busy trying to prevent the accident. Even if an outsider had said anything, I would have used my own judgment as to the best means of stopping those cars. I was in a position where I could see better than any one else, and I couldn't do more than I was doing. I was setting the brakes as fast as I could.

Cross-examination:

We started to drop the cars down from a point two or three car-lengths north of the switch of the Winnamuck track with the tramway track. I should judge that point was 15 or 20 car-lengths from the place of the accident. I didn't see Leak and his team when I started the cars. I couldn't have much more than started with the cars when I saw him drive up; possibly the cars had gone 30 to 40 feet when I saw him. He was then driving upon the track that I was coming down on. I think he was driving around Madsen. He was probably ten car-lengths ahead of me. A medium car is 33 feet long; the largest 34. Leak was going south and I was following him. I stopped the train as quick as I could. At the time

of the wreck I was busy setting up the brakes. At the time of the collision I was on top of a box car setting a brake. I set up three and was at the fourth brake at the time. I had 100 yards
71 and the car had just started when I saw Leak and I could not stop the train. We had enough men on the train to manage it. I don't know Madsen, the teamster, but I saw a man unloading there and there was a team there. I don't remember seeing him at the time of the wreck. I didn't state to him at that time that it was no use for me to try to stop the cars because I saw I couldn't do it in time before it struck Leak's wagon, nor did I say that in substance; I used no such language.

CHARLES F. BIPPUS, being duly sworn as a witness in behalf of defendant, testified:

My business is railroading; I have followed that business about twenty years. I have been in the employ of the defendant company. I don't know whether I am new in its employ or not. I have been sick and am sick now. I remember the occasion of the accident to plaintiff in the Bingham yard in July, 1891. I know the plaintiff by sight. At that time I was working for the South Galena Mining Company at the depot and I am familiar with the southern portion of the yard there. When I first saw Leak I was standing on the north side of the tool-house, as shown on the plat, and he was just coming past the north chute, as shown on the map. I saw the cars at that time and I was going toward the chute. Just before I got to the chute I saw Leak and called to him that the cars were coming down the grade. I called just as soon as I saw him. I should judge I was 50 to 60 feet away from him. I cannot say just how loud I called. My intention was to warn him. I
72 called loudly enough for a man to ordinarily hear at that distance. Leak kept driving on to the south. I didn't see him make any motion directly after I called, but after he got up a little farther he seemed to be urging his horses to go pretty fast, and I called to him a second time. By that time I was up on the track. Just after I called the second time he turned around, and I thought he was picking up his whip; I thought that was what he stooped for—to pick up something. He turned sideways in his wagon, with his head toward me. That would bring his head to the east, and he stopped to pick up something. He raised up, and a short time afterwards he was struck. There was sufficient space for him to have escaped if he had stopped when I first called to him. The front part of the wagon was just about opposite the south end of the north chute. I cannot say that I saw anybody on the cars which were coming down the grade when I first stepped out, but just about the time I called the second time I saw a brakeman on top of the first box car—he was setting a brake—a second or two before the collision; I cannot remember exactly. I was anxious. I was looking to see where the cars were and watching Leak; tried to do both at the same time. I had been about the yard prior to the accident about two months and working for the South Galena

Company. I had noticed the method of switching in the yard before that time. I think it was an every-day occurrence for the engine to push cars up the grade track or the Winnemuck track and for the engine to come in on the tramway track and let the cars run down on the grade track so as to get the engine from one end of the cars to the other. It was an every-day occurrence when they did switching.

Cross-examination:

73 On the start I didn't have a clear view of Leak. I was standing up on the grade and back a ways and about a car-length higher than the place where Leak was driving, or rather the height of a car higher. I had a clear view of the Winnamuck grade. I didn't see Leak drive around at the north end of the ore track, and I don't think before the accident I saw another man unloading ore on the east side of the ore track. I know there was a man unloading there. I cannot now say that I saw him when the cars were coming up. I don't think that I could from where I was standing. I didn't see Leak drive around the north end of the ore track and pass Madsen. My deposition was taken in Bennett, Marshall & Bradley's office when I was anticipating going away, and I gave my testimony at that time. I don't think at that time I testified that I saw Leak drive around the north end of the ore track and pass Madsen. I think the first I saw of him was when he was passing the chute when I stepped out. When I first saw Leak the cars were coming down the grade; they were in motion. I didn't think that at the same time I testified that after Leak had passed Madsen the cars up on the grade were standing still. I called twice to Mr. Leak. Several seconds—perhaps 10 seconds—elapsed between the two calls. I don't know that I can repeat the exact words I used. In substance I said, "Look out! The cars are coming down the hill," or, "The cars are coming down the hill." My intention was that Leak should hear it. I couldn't say whether he did or didn't hear it. Leak kept driving right on in the same direction, urging his team. I didn't notice him look around until he stopped, after the first call. He kept still driving on up the cañon. The second time I said, in substance, about the same thing. I cannot recall the words. At that time Leak

74 stooped down. He didn't make any reply that I heard. I saw him stoop. I cannot say that I saw him pick anything up, and my supposition is all that I have to go on as to why he stopped. I don't know. A few seconds elapsed between the second call and the time of the collision. About that time, I think, was the first I saw of the brakeman. He was then on top of a box car, setting a brake. I cannot say that I saw him setting a brake before that time. I had a clear view of the cars coming down the grade, especially of the box cars. The track is a good deal lower than where I stood. Leak was struck south of the depot, probably 100 to 125 feet away. I have seen the brakeman that was on the car since that time. I don't know his name. He stopped in the same

hotel that I did, and he is the witness who just preceded me on the stand.

Defendant rests.

75 *Rebuttal.*

(Mr. POWERS:) We want to offer, your honor, a portion of the deposition of Mr. Peter Madsen that was objected to and ruled out at the time the deposition was read, which I now claim is competent to contradict the witness Stowe.

(Reading:) What was the breakman's name?
A. I don't know his name.
Q. I will now ask you what he stated to you.
A. He stated it was no use for him to try to stop the cars, because he could not do it in time before it struck Mr. Leak's wagon, or something to that effect; that was the main substance of it. I don't know whether I have used word for word.

FRANK LEAK, being recalled as a witness in his own behalf, testified:

I heard Mr. Bippus' statement that he called me just prior to the accident. I didn't hear any one call me to look out for the cars. I have not been engaged in any employment since the injury and have not done any work since then. I have not worked down at the Hanauer smelter since then nor did I ever work at a smelter in my life. I live at West Jordan. I am not a married man.

76 S. E. REAUGH, recalled as a witness in behalf of defendant, testified:

The grade on the Winnamuck track changes from a downgrade to the south to an upgrade to the south at the point marked station 1, which is a little north of A 2. Proceeding to the south from station 1, the grade of the track going to the south is 4 feet in 100 feet going up to the south.

The foregoing, together with a map, Exhibit A, hereto attached as a part hereof, is all the evidence given at said trial.

Except that the plaintiff in his testimony stated in effect: Thus the harness of his said team was damaged by the occurrence which was the subject of this suit to the amount of $35.00; and thereupon, on motion of the defendant, said testimony was ordered by the court to be stricken from the record; and, furthermore, the fact is that the plaintiff did not at the trial, by pleading or by evidence offered, except as stricken out as above stated, make any claim for damages against defendant by reason of any damage to the said harness.

77 The court instructed the jury as follows, to wit:

1. This is an action to recover damages for an injury to the person and property of the plaintiff, caused, as is alleged, by the negligence of the defendant described in plaintiff's complaint. The

action is not to recover damages in consequence of any other negligence than that described in the plaintiff's complaint.

The negligence stated is in the following language: "That on or about the 11th day of July, A. D. 1891, this plaintiff was engaged in the business of hauling ore to cars of the defendant situate on its said track, and was travelling with his team of horses and wagon on a wagon road usually travelled and provided by defendant to be travelled in the business of hauling ores to the cars and was then at or about the place where the wagon — crosses the railroad aforesaid, and as the plaintiff had reached the place or crossing the defendant carelessly and negligently caused a train of cars to approach crossing and then and there to pass rapidly over the track of the railroad and negligently and carelessly omitted its duty whilst approaching the crossing to give any signals of warning whatever of the approach of the cars or to stop or to slacken the speed thereof, by reason whereof this plaintiff without any fault on his part was unaware of their approach." You perceive, gentlemen of the jury, that the negligence particularly mentioned and described is that the defendant carelessly and negligently caused its cars to approach the crossing, and that it failed to give any signal or warning whatever of its approach or to stop or to slacken the speed thereof before the injury. The defendant in its answer denies
the allegations of the complaint and allege that the plaintiff
78 was also guilty of negligence that contributed to the injury, and it is for gentlemen of the jury, in the light of all the evidence, after carefully considering it, to determine, first, whether the defendant was guilty of the negligence described in the complaint; second, if you should find that defendant was guilty of negligence described in the complaint, it is then your duty to consider and determine whether the plaintiff himself was guilty of negligence that contributed to the injury.

2. In determining the question of negligence, both on the part of the plaintiff and defendant, you should consider all the circumstances under which the defendant caused the acts to be performed, as alleged in the complaint, and under which its agents or servants failed to act, if you find that they did fail in such respect. You have a right to take into consideration the conditions surrounding the injury, the situation of the parties, the location of both the railroad tracks and the wagon road, if you believe there was a wagon road from the evidence, and their location with respect to each other, and the fact that the plaintiff was hauling ore, if you believe that he was (as to that, I presume, there is no dispute). You have a right to take into consideration the cars of the defendant and their situation and location upon the ore track. You have a right to take into consideration the crossing, as to whether the defendant placed the crossing there for the plaintiff and others to travel over and upon the wagonway, if you believe there was a wagon — on which persons usually travelled, and that the plaintiff at the time of the injury was travelling upon the wagonway. You have a right to take into consideration the fact that the train of cars, one of which

struck plaintiff's wagon (as to that, I presume, there is no
79 dispute)—you have a right to take into consideration the fact that it came down grade without an engine attached to it, and then passed up a slight grade at the time it struck the plaintiff's wagon, if — believe from the evidence that it did so pass down and up.

It is your duty to take into consideration all of the evidence bearing upon the question of negligence, and, in the light of it all, you must determine whether the defendant was guilty of the negligence charged or whether the plaintiff was guilty of negligence contributing to the injury.

(The defendant duly excepted to that portion of the foregoing instruction in which the court instructed the jury as follows: "You should consider all the circumstances under which the defendant caused the acts to be performed as alleged in the complaint.")

3. It was the duty of the defendant and its servants to use ordinary care, which would amount to such care as a prudent man would reasonably use in the discharge of the duties connected with this accident; and if you find that the defendant did not use such care under all the circumstances as prudent railroad men should ordinarily use under the circumstances in moving the car which caused the injury, and as it was moved that the defendant did not use such ordinary and reasonable care as a prudent man competent to perform the duties should have used, then it is your duty to say that the defendant is guilty of negligence.

4. The court further charges you that though the defendant may have been guilty of negligence that contributed to the injury, yet if the plaintiff was also guilty of negligence that contributed
80 to the injury he cannot recover, and in determining whether he acted with due care you may take into consideration the circumstances under which he was acting. You have a right to take into consideration he was travelling upon the travelled way usually travelled by persons hauling ore to this train. You have a right to take into consideration the observation that he made, so far as the evidence shows it—whether he looked out, as he should have done, for the danger of coming cars or whether he listened. You should take into consideration all of the circumstances—all that he done and all that he failed to do—in order to determine whether he acted with due care or was guilty of negligence.

5. The court further charges you that if the plaintiff attempted to cross defendant's line of railway or to approach so near it as injury might have resulted to him, where he should, by the exercise — ordinary care, see that it was especially dangerous, it was plaintiff's duty to use an amount of care proportionate to the danger. Of course, when persons are acting under dangerous circumstances and conditions, it is their duty to act with respect to the danger that surrounds them and to use a greater degree of care where there is much danger than where there is but little.

6. The court further charges you that the defendant was not liable to the plaintiff under the proceedings of this action for any defect in the manner of locating and construction of its track or switches.

They have not alleged the location or construction of the switches as a cause of action, but it is your duty, in order to determine whether the plaintiff or the defendant acted negligently or with due care, to take into consideration the location of the tracks and the whole situation as shown by the evidence in order to deter-
81 mine whether they did act prudently and with good care or, on the contrary, whether they acted with negligence.

7. The court further charges you that you are the judges of the credibility of the witnesses who have testified before you, and in judging of their credibility you have a right and it is your duty to take into consideration their manner upon the witness stand, their motives so far as they may appear from the evidence and so far as you have a right as reasonable men to infer them from the evidence. You have a right to take into consideration the opportunities of the witnesses to know that to which they testify and their capacity to understand and remember. You have a right to take into consideration the facts whether their statements are reasonable or unreasonable in the light of all the evidence; their apparent frankness and candor or the want of it. In fact, you have a right to take into consideration any fact or circumstance in evidence that in your judgment affects the credibility of any witness. You are the sole judges of their credibility. It is your duty to weigh the evidence carefully, candidly, and impartially, and in so weighing it you should be careful to draw reasonable inferences, not to pick out any particular fact and give it undue weight, but you should give it such weight as you think it is entitled to as reasonable men looking at it impartially. You should consider the evidence all together. Where there is a conflict in the testimony you should reconcile it if you can upon any reasonable hypothesis. If you cannot reconcile their testimony, then you must determine whom you will believe. You are the sole judges of the facts.

8. If you find the issues for the plaintiff you should con-
82 sider the extent of the injury as it appears from the evidence, whether it is permanent or temporary. You have a right also to take into consideration the physical pain and mental anguish caused by the injury and the extent which the plaintiff has been deprived of the capacity to earn a living or to accumulate money or other property. You have a right to take into consideration the injury to his property, the fact that his horse was killed, the injury to the wagon and the harness, if you believe from the evidence that they were injured, and, so considering all the evidence with respect to the injury of the plaintiff and his property as described in the complaint, you should give him such compensation as will remunerate him for the injury sustained. You must look at it in a pecuniary point of view, estimating his loss in money.

If you find for the plaintiff you should state in your verdict the amount of damages that you find. If you find the issues for the defendant you will so state in your verdict.

(The defendant duly excepted to that portion of the foregoing instruction in which the court instructed the jury that in estimating

the damage they should consider the injury to the plaintiff's harness.)

The foregoing are all the instructions of the court.

83 The defendant requested the court to instruct the jury as follows, to wit:

1. "It was the duty of the plaintiff before he crossed the line of defendant's railway, or approached it so closely that he might be injured by cars passing thereon, to look and listen up and down the track for approaching cars, and if he failed to so look and listen just prior to and up to the time of the accident, and if by so doing he could have discovered the approaching cars in time to have avoided the accident, his failure to so look and listen was negligence contributing to his injury, and your verdict must be for defendant unless you believe that defendant's servant in charge of said cars discovered plaintiff's danger in time to have avoided the accident by the use of ordinary care."

But the court refused to so instruct the jury; to which refusal the defendant then and there duly excepted.

2. "If before crossing defendant's line of railway or approaching the same so closely that he might be injured by cars passing thereon, the plaintiff did look and listen for approaching cars and ascertained that such cars were approaching, or might have so ascertained if he had looked and listened with ordinary care, then it was *the* negligence for the plaintiff to drive so close to such railway as to be injured by passing cars, although the plaintiff may have believed that he could succeed in crossing said line before the cars reached the place of collision, and your verdict must be for defendant unless you believe that defendant's servant in charge of said cars discovered plaintiff's danger in time to have avoided the accident by the use of ordinary care."

But the court refused to so instruct the jury; to which refusal the defendant then and there duly excepted.

84 4. "If the plaintiff was injured at a point in the defendant's yard where he had not been licensed or authorized by defendant to go, then the defendant would not be liable for any injury to him by passing cars unless defendant's servants in charge of said cars knew of plaintiff's danger in time to have avoided the accident by the use of ordinary care."

But the court refused to so instruct the jury; to which refusal the defendant then and there duly excepted.

6. "If the defendant licensed the plaintiff to go with his team in that portion of its yard where plaintiff was injured, yet defendant would not be liable to plaintiff for any injury resulting to him from any condition of the premises known to the plaintiff from the ordinary nature of the business carried on by it there."

But the court refused to so instruct the jury; to which refusal the defendant then and ther- duly excepted.

8. "You are instructed to find a verdict for the defendant."

But the court refused to so instruct the jury; to which refusal the defendant then and there duly excepted.

9. "If the plaintiff saw the cars coming and knew that there was danger of a collision, or by the use of ordinary care could have so seen and known in time to escape therefrom by leaving his wagon, and if, notwithstanding such danger, he remained in his wagon for the purpose of attempting to save his wagon or horses, then you should not find a verdict in favor of plaintiff in respect to any injury to his person unless you believe from the evidence that the brakeman in charge of said cars saw plaintiff's danger in
85 time to have avoided the accident by the use of ordinary care."

But the court refused to so instruct the jury; to which refusal the defendant then and there duly excepted.

86 After being so instructed and on November 25th, 1892, the jury brought in a verdict against the defendant and in favor of the plaintiff and assessed plaintiff's damage at the sum of $13,370.

On the 5th day of December, 1892, the defendant duly filed and served on the attorney for plaintiff a notice of defendant's intention to move for a new trial of this action, which was in the words and figures as follows, to wit:

(Title.)

You are notified that the defendant above named intends to and will move the court to vacate and set aside the verdict of the jury and judgment rendered herein in favor of the plaintiff and against the defendant and to grant a new trial of the action on the following grounds, namely:

1. Irregularity in the proceedings of the jury, by which the defendant was prevented from having a fair trial.

2. Misconduct of the jury.

3. Excessive damages, appearing to have been given under the influence of passion and prejudice.

4. Insufficiency of the evidence to justify the verdict.

5. That the verdict is against the law.

6. Error in law occurring at the trial and excepted to by the defendant.

The motion will be made and based on the records and files herein and on a statement of the case to be hereafter prepared and served on you, and also on affidavits to be hereafter prepared
87 and served on you and filed herein.

Dated December 5th, 1892.

BENNETT, MARSHALL & BRADLEY,
Defendant's Attorneys.

88 *Specification of Particulars in which the Evidence was Insufficient to Justify the Verdict.*

1. The damages given were excessive. The injury to plaintiff appears to have been the crushing of his leg below the knee; its amputation; the loss of a wagon and one horse. At the time of the injury the evidence shows that the plaintiff was capable of earn-

ing about $3 per day; was an unmarried man, 28 years old. The damages given were so out of proportion to those suffered that the verdict appears to have been influenced by passion and prejudice.

2. The evidence shows that the plaintiff was guilty of contributory negligence and for that reason fails to justify the verdict, it appearing from the evidence that the plaintiff for a year and a half prior to the accident had driven a team about the yard; was familiar with the railroad yard and with the manner of switching therein; that he knew of the particular method of switching which caused his injury and which is now claimed to have been negligent, and yet so knowing drove so close to the railroad track as to be caught by a passing car and without either looking or listening for such cars, and that if he had used ordinary precautions of looking or listening or paid any attention to the switching then being done he would have known of the danger and could have escaped.

89 *Specification of Particular Errors at Law Occurring at the Trial and Excepted to by the Defendant and on Which it Will Rely.*

1. The court erred in overruling defendant's objection to the question, "You directed the man on top of the box car?" and to the answer thereto, and in permitting the said answer.

2. The court erred in giving its second instruction to the jury in the particular as to which said instruction is excepted to.

3. The court erred in giving its eighth instruction to the jury in the particular in which said instruction is excepted to—namely, in instructing the jury therein that in estimating plaintiff's damage they might consider the injury to the harness.

4. The court erred in refusing defendant's request 1.

5. The court erred in refusing defendant's request 2.

6. The court erred in refusing defendant's request 4.

7. The court erred in refusing defendant's request 6.

8. The court erred in refusing defendant's request to instruct 7.

9. The court erred in refusing to instruct as requested in defendant's request No. 9.

BENNETT, MARSHALL & BRADLEY,
Attorneys for Defendants.

89*a* The foregoing statement, including the map Exhibit "A," having been duly served within the time stipulated therefor by counsel for plaintiff and defendant, the same is hereby settled and allowed as and for defendant's statement on motion for a new trial in said action and on appeal therein.

C. S. ZANE, *Judge.*

Dated May 2nd, 1893.

Indorsed: In the district court of the 3rd judicial district of Utah. #9898. Frank Leak, pl'ff, *vs.* Rio Grande W. R'y Co., def't. Statement. Due service accepted April 19, 1893. Powers & Hiles, att'ys for pl'ff. Filed May 2nd, 1893, after settlement. Henry G. McMillan, clerk.

(Here follows map marked p. 89*b*.)

90 FRANK LEAK
vs.
RIO GRANDE WESTERN RAILWAY COMPANY.

The motion for a new trial in this cause having been heretofore argued and submitted to the court, the court, upon consideration thereof, orders that a new trial be granted, unless said plaintiff shall abate and surrender $3,000 of the verdict and judgment herein.

Comes now O. W. Powers, attorney for plaintiff, and remits the sum of $3,000 of the verdict and the judgment herein, and the court orders that record of such remission be made, and it is ordered that the motion of the defendant for a new trial herein be, and the same is hereby, overruled.

Exception by defendant.

Dated May 3rd, 1893.

91 UTAH TERRITORY, } *ss:*
County of Salt Lake, }

In the District Court of the Third Judicial District.

FRANK LEAK, Plaintiff,
vs.
THE RIO GRANDE WESTERN RAILWAY COMPANY, Defendant. } No 9898.

To the plaintiff and to his attorneys, Powers & Hiles:

You are notified that the defendant above named appeals to the supreme court of Utah Territory from the whole and every part of the judgment given and made herein on December 8th, 1892, in favor of plaintiff and against defendant, the present amount of said judgment being $10,370 damages and $84.55 costs and interest, and from the whole and every part of the order made herein May 3rd, 1893, overruling defendant's motion for a new trial and refusing a new trial of the action.

Dated May 9th, 1893.

BENNETT, MARSHALL & BRADLEY,
Attorneys for Defendant.

(Indorsed:) 3rd district court. No. 9898. Frank Leak *vs.* Rio Grande West. R'y Co. Notice of appeal. Due service of copy admitted 5, 9, 1893. Powers & Hiles, attorneys for plaintiff. Filed May 9, 1893. Henry G. McMillan, clerk, by Geo. D. Loomis, deputy.

92 In the District Court of the Third Judicial District of Utah Territory.

FRANK LEAK, Plaintiff,
vs.
THE RIO GRANDE WESTERN RAILWAY COMPANY, Defendant. } No. 9898.

Whereas the defendant above named is about to appeal to the supreme court of Utah Territory from the whole and every part of the judgment given and made herein on December 8th, 1892, in favor of plaintiff and against defendant, the present amount of said judgment being $10,370 damages and $84.55 costs and interest, and from the whole and every part of the order made herein May 3rd, 1893, overruling the defendant's motion for a new trial:

Now, in consideration of such appeal, we, the undersigned defendant, as principal, and William F. Colton and J. H. Bennett, of Salt Lake county, Utah, as sureties, do hereby, jointly and severally, undertake and promise that the appellant will pay all damages and costs which may be awarded against it on the appeal or on a dismissal thereof not exceeding $300.

THE RIO GRANDE WESTERN RAILWAY CO.,
By WM. F. COLTON, *Assistant Secretary.*
WILLIAM F. COLTON.
J. H. BENNETT.

Signed in the presence of—
WILLIAM PISCHEL.

93 UTAH TERRITORY, } *ss:*
Salt Lake County, }

William F. Colton and J. H. Bennett, being severally duly sworn, each for himself on his oath says: I am one of the sureties named in and who subscribed the foregoing undertaking. I am worth the sum of $300, the amount specified in said undertaking, over and above all my just debts and liabilities, exclusive of property exempt by law from execution. I am a resident and householder of and within Salt Lake county, Territory of Utah.

WILLIAM F. COLTON.
J. H. BENNETT.

Subscribed and sworn to before me May 6th, 1893.

WM. A. ROBERTSON,
[SEAL.] *Notary Public, Salt Lake Co., Utah.*

My commission expires March 26th, 1894.

(Indorsed:) 9898. Filed May 9th, 1893. Henry G. McMillan, clerk, by Geo. D. Loomis, deputy.

94 In the District Court of the Third Judicial District of Utah Territory.

FRANK LEAK, Plaintiff,
vs.
THE RIO GRANDE WESTERN RAILWAY COMPANY, Defendant. } No. 9898.

Whereas the defendant above named is about to appeal to the supreme court of Utah Territory from the whole and every part of the judgment given and made herein on December 8th, 1892, in favor of plaintiff and against defendant, the present amount of said judgment being $10,370 damages and $84.55 costs and interest, and from the whole and every part of the order made herein May 3rd, 1893, overruling defendant's motion for a new trial:

Now, in consideration of a stay of the proceedings and execution on said judgment and order, the undersigned defendant, as principal, and W. F. Colton, J. H. Bennett, W. M. Bradley, and Robert Harkness, as sureties, do hereby undertake and bind themselves in the sum of $25,000 and promise that if said judgment or order appealed from or any part thereof be affirmed or the appeal dismissed the appellant will pay the amount directed to be paid by the judgment or order or the part of such amount as to which the judgment or order is affirmed, if affirmed only in part,

95 and all damages and costs which may be awarded against the appellant upon the appeal, and that if the appellant does not make such payment within thirty days after the filing of the remittitur from the supreme court in the court from which the appeal is taken judgment may be entered on motion of the respondent in his favor against said sureties severally for the amounts only as in their following affidavit they state they are severally worth, up to an aggregate not exceeding the amount of such payment and the interest that may be due thereon and the damages and costs which may be awarded against the appellant upon the appeal.

THE RIO GRANDE WESTERN RAILWAY COMPANY,
By WILLIAM COLTON, *Assistant Secretary.*
J. H. BENNETT.
ROBERT HARKNESS.
W. M. BRADLEY.
WM. F. COLTON.

Signed in the presence of—
WILLIAM PISCHEL.

96 UTAH TERRITORY, } *ss:*
Salt Lake County, }

W. M. Bradley, Robert Harkness, J. H. Bennett, and Wm. F. Colton, being severally duly sworn, each for himself on his oath says: I am one of the sureties named in and who subscribed the foregoing undertaking. I am worth the sum of $6,250, the amount

specified in said undertaking, over and above all my just debts and liabilities, exclusive of property exempt by law from execution. I am a resident and householder of an- within Salt Lake county, Utah Territory.

WILLIAM BRADLEY.
ROBERT HARKNESS.
J. H. BENNETT.
WM. F. COLTON.

Subscribed and sworn to before me May 6th, 1893.

WM. A. ROBERTSON,
[SEAL.] *Notary Public, Salt Lake Co., Utah.*

My commission expires March 26th, 1894.

(Indorsed:) 9898. Filed May 9th, 1893. Henry G. McMillan, clerk, by George D. Loomis, deputy.

97 We hereby certify the foregoing transcript is a full, true, and correct copy of the record in the foregoing-entitled case.

POWERS & HILES,
Attorneys for Plaintiff, Respondent.
BENNETT, MARSHALL & BRADLEY,
Attorneys for Defendant and Appellant.

Filed and transmitted May 18th, 1893.

HENRY G. McMILLAM, *Clerk*,
By GEORGE D. LOOMIS, *Deputy*.

98 In the Supreme Court of Utah Territory, Regular June Term, 1893.

FRANK LEAK
v.
RIO GRANDE WESTERN RAILWAY CO., Appellant.

FRIDAY, *June 23rd.*

This cause, coming on regularly to be heard, was submitted on printed brief in behalf of appellant, was argued by D. N. Straup, Esq., for respondent, and taken under advisement.

99 & 100 In the Supreme Court of Utah Territory, Regular June Term, 1893.

FRANK LEAK
v.
THE RIO GRANDE WESTERN RAILWAY COMPANY, Appellant.

WEDNESDAY, *Aug. 30th.*

This cause having been heretofore argued and submitted and the court being sufficiently advised thereon, it is now here considered,

ordered, and adjudged that the judgment of the district court therein be, and the same is hereby, affirmed with costs.

Thereupon, upon application of counsel for appellant, it was ordered that the penal sum of a supersedeas bond and bond for costs to be given on writ of error taking this cause to the Supreme Court of the United States be, and is hereby, fixed in the sum of twenty thousand (20,000) dollars.

101 In the Supreme Court of Utah Territory.

FRANK LEAK, Respondent,
vs.
THE RIO GRANDE WESTERN RAILWAY COMPANY, a Corporation, Appellant.

MINER, *J.*:

The plaintiff in this case was a teamster hauling ore from the mines at Bingham Canyon and placing it in cars provided for it by the defendant at Bingham, Utah. The railroad track and yard at Bingham extend southwesterly down the canyon; the track lying east of the depot is called the "main track," and the ore track is about twenty-two feet east of it. The switch track runs east of the ore track and joins with it. The widest point between the cars on these tracks is eight feet and nine inches. At the place of the accident the cars would be six feet and four inches apart.

Between the ore and switch tracks there is a well-traveled road, as also between the main and ore tracks. Plank crossings were placed by the defendant near both ends of the switch track where it joins the ore track for the use of the teamsters in crossing the track. A track called the "Winnamuck track" runs northeast from the switch track, built on a slight grade, and the "tramway track" lies further east, connecting with the Winnamuck track, and still further west there is a six-foot ditch without bridges. Along these tracks were houses and trees which partly obscured the locality, where the tramway and Winnamuck tracks join, from plaintiff's view as he drove over the crossing. Appellant's cars were placed on the ore track for the purpose of being loaded with ore by teamsters who came down the narrow canyon in the wagon road
102 between the main and ore tracks. After unloading, these teamsters would usually cross the ore track at the northerly crossing and drive back up the canyon between the ore and switch tracks. This was the only way provided for going to and unloading ore into the cars.

On the day of the accident complained of the ore track was filled with cars from crossing to crossing, and there was a long string of cars on the main track, extending northerly beyond the depot, so that after unloading ore the only available way to drive out of the yard was to cross the ore track at the northerly crossing and pass back up the canyon in a southerly direction between the ore and switch tracks.

It was the custom of the defendant to push empty cars up the Winnamuck tracks with an engine past the house track until it

reached the junction with the tramway track, and then detach its engine from the cars and run it along the tramway track and allow its cars to pass down the Winnamuck track onto the switch track of their own gravity, and thus cross the ore and switch tracks.

On the day of the accident complained of plaintiff unloaded his ore into defendant's cars standing on the ore track and then drove across the northerly crossing of the ore track and along the usual traveled road between the ore and the switch tracks up the canyon, and after driving about one hundred and eighty feet five box and coal cars, which had been detached from the locomotive engine in the manner before described, were turned loose by the defendant's servants, and by force of gravity ran down the street grade of the Winnamuck track onto the switch track, striking the rear end of respondent's wagon, and crushing him and his horses and wagon between such cars and the cars standing on the ore track six and one-half feet away, from which he suffered injuries, making it necessary to amputate his leg above the knee.

103 It appears from the plaintiff's testimony that he looked and listened for cars before passing up the track, but saw none on the track; that there was no warning or signal of any kind given to warn him of the approaching cars, and no watchman was kept at the place in question. The cars came down the grade at the rate of twenty miles an hour. A breakman standing on the top of the front car testifies that he set the brakes before reaching the wagon. Other testimony tends to show that no attempts *was* made to set the brakes until the wagon was reached. The plaintiff was a healthy man of twenty-eight years of age and was earning three dollars per day. It also appears that the plaintiff has been engaged in hauling ore at this point for eighteen months, and was well acquainted with the different tracks in the yard and with the method used in switching cars.

Plaintiff recovered a judgment in the court below for thirteen thousand three hundred and seventy dollars. Defendant's motion for new trial was overruled on condition that three thousand dollars be remitted from the judgment, which was done. Thereupon the defendant appealed from the judgment and from the order denying defendant's motion for a new trial. The appellant seeks a reversal of the judgement, assigning many errors therefor. We shall only consider such assignments of error as are discussed in appellant's brief.

Error is assigned upon the refusal of the trial court to instruct the jury that it was the plaintiff's duty, before crossing defendant's line of railway or before approaching so closely thereto that he might be injured by passing cars, to both look and listen for the cars, and if he failed to do so and if by so doing the collision could have been averted, then the plaintiff was guilty of contributory negligence and could not recover. The court instructed the jury upon this subject as follows: "The court further charges you

104 that though the defendant may have been guilty of negligence that contributed to the injury, yet if the plaintiff was also guilty of negligence that contributed to the injury he cannot

recover, and in determining whether he acted with due care you may take into consideration the circumstances under which he was acting. You have a right to take into consideration he was traveling upon the traveled way usually traveled by persons hauling ore to this train. You have a right to take into consideration the observation that he made, so far as the evidence shows it, whether he looked out, as *as* he should have done, for the danger of coming cars or whether he listened. You should take into consideration all of the circumstances, all that he did and all that he failed to do, in order to determine whether he acted with due care or was guilty of negligence."

"5. The court further charges you that if the plaintiff attempted to cross defendant's line of railway or to approach so near it as injury might have resulted to him, where he should by the exercise of ordinary care see that it was especially dangerous, it was plaintiff's duty to use an amount of care proportioned to the danger. Of course when persons are acting under dangerouse circumstances and conditions it is their duty to act with respect to the danger that surrounds them and to use a greater degree of care where there is much danger than where there is but little."

The testimony shows that the respondent did look and listen for cars as he drove around the cars on the ore track to the south, and that he neither saw -or heard any cars on the Winnamuck track. This testimony was not disputed.

It will be seen that the court did charge the jury that although the defendant may have been guilty of negligence that contributed to the injury, yet if the plaintiff was also guilty of negligence that contributed to the injury he could not recover, and that in determining whether plaintiff acted with due care or negligently
105 contributed to the injury the jury should take into consideration the observation that he made, whether he looked out, as he should have done, for danger of coming cars or whether he listened; that the jury should consider all he did and all he failed to do in order to determine whether he acted with due care or was guilty of negligence.

The question of negligence on the part of the defendant, as well as the question of contributory negligence on the part of the plaintiff, which was the proximate cause of the injury, were proper questions of fact for the jury to determine under all the circumstances of the case and under proper instructions from the court. The question as to whether the plaintiff at the time of the accident was under all the circumstances of the case in the proper exercise of such due and reasonable care and diligence as would be expected of a reasonable, prudent, careful person similarily situated was no more a question of law for the court that was the question of negligence on the part of the defendant.

It was held in "Grand Trunk Railway Co. *vs.* Ives," 144 U. S., 417, that "each case must stand upon its own merits and be decided upon its own facts and circumstances, and these are the features which make the question of negligence a primary one for the jury to determine under proper instructions from the court."

There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent and what shall constitute ordinary care under any and all circumstances.

"It is the provence of the jury to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men under a similar state of affairs. When a given state of facts is such that reasonable men may fairly
106 differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court."

We think the question involved was fairly covered by the charge of the court, and thus properly left for the consideration of the jury.

Quibell *vs.* U. P. R. R., 7 Utah, 122.
Olson *vs.* Oregon Short Line, 33 Pac. Rep., 623.
Wines *vs.* Rio Grande & Western Railway Co., decided June term, 1893.
Hartford Life Annuity Co. *vs.* Unsell, 144 U. S., 439.

Error is also assigned upon the refusal of the court to instruct the jury that "if the defendant licensed the plaintiff to go with his team in that portion of its yard where plaintiff was injured, yet defendant would not be liable to plaintiff for any injury resulting to him from any conditions of the premises known to plaintiff or from the ordinary nature of the business carried on by it there."

This was refused, and the court charged the jury as follows: "The court further charges you that the defendant was not liable to the plaintiff under the proceedings of this action for any defect in the manner of the locating and construction of its tracks or switches. They have not alleged the location or construction of the switches as a cause of action, but it is your duty, in order to determine whether the plaintiff or the defendant acted negligently or with due care, to take into consideration the location of the tracks and the whole situation as shown by the evidence in order to determine whether they did act prudently and with good care or, on the contrary, whether they acted with negligence."

107 We think this refusal contained no ground for reversal, for the reason that the court charged the jury that the defendant was not liable to the plaintiff under the pleading for any defect in the manner of the location or construction of the track or switches, etc. The charge contained all that was necessary to say upon that subject, and the defendant could not have been prejudiced by it.

Hartford Life Annuity Co. *vs.* Unsell, 144 U. S., 439.

Error is alleged upon the refusal of the court to charge the jury that if the plaintiff saw the cars coming and knew there was danger, or could by the use of ordinary care have seen the cars in time to

escape by leaving his wagon, but instead of doing so remained for the purpose of saving his wagon and horses, that in that case no damages should be found for any injury to his person, etc.

So far as this request involved the question of contributory negligence of the plaintiff it was sufficiently covered by the general charge of the court. In the case of "Grand Trunk Railway Co. *vs.* Ives," 144 U. S., 433, the court, in the discussion of a similar question, says: "The reason given by the court for refusing this request was that it is too much upon the weight of the evidence and confines the jury to the particular circumstances narrated without notice of others that they may think important. This reason is a sound one. In determining whether the deceased was guilty of contributory negligence the jury was bound to consider all the facts and circumstances bearing upon that question, and not select one particular, prominent fact or circumstance as controlling the case to the exclusion of all others."

On looking over the record we find no testimony that the plaintiff had notice or knew that the cars were coming behind him until just before he was struck. Bippus testifies that he was about
108 sixty feet away from the plaintiff when he saw the cars coming, and that he called to him while his wagon was in motion going south that the cars were coming; that plaintiff made no motion directly after he called, but after he had gone further and after his second call and just before he was struck plaintiff seemed to urge his horses faster. Witness could not say whether plaintiff heard his warning or not. Plaintiff testifies that he did not hear the warning from Bippus; did not know the cars were coming, and that the cars came down upon him so quickly that he could not get out.

Error is assigned upon the ground that the court instructed the jury that in case they found for the plaintiff they could include damages to plaintiff's harness. The pleadings do not show that any claim was made for such damage. The record shows that plaintiff testified that his harness was damaged to the extent of thirty-five dollars, and thereupon, on motion of the defendant, said testimony was stricken out. It also appears that the plaintiff did not claim any such damage either by pleading or by evidence.

Testimony was offered and not contradicted that the horse killed was worth one hundred and fifty dollars, the wagon one hundred and fifteen dollars, and the expense of medical attendance one hundred and five dollars, making three hundred and seventy dollars. The verdict of the jury was for thirteen thousand three hundred and seventy dollars. There was no evidence in the case upon which to base the instruction. The use of the word "harness" in connection with damage to the horses was doubtless a mere inadvert*a*nce on the part of the court, and had the attention of the court been called to it at the time it would have been corrected.

109 It is not at all probable that the jury awarded any damage on account of this harness in making up their verdict when there was no evidence upon which to support it. We are inclined to think the instruction was harmless. It was not applicable to the

facts in the case, and the judgment should not be disturbed on that account.

People *vs.* March, 6 Cal., 544.

Error is also assigned upon the refusal of the court to instruct the jury to return a verdict for the defendant. This question involves the question as to the contributory negligence of the plaintiff, and has been fully discussed.

We have endeavored to consider and briefly discuss all the questions that have been presented in the briefs of counsel. We do not think it has been shown that any error was committed in the trial below which was prejudicial to the rights of the appellant.

The judgment of the court below is affirmed with costs.

We concur.

BARTCH, *J.*

SMITH, *J.*

Endorsed: Title court and cause. Opinion. Filed Aug. 30th, 1893. Jos. P. Bache, clerk.

110 By the Honorable Charles S. Zane, chief justice of Utah Territory, to Frank Leak and to Messrs. Powers & Hiles, his attorneys, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, in the District of Columbia, within sixty (60) days from the date of this citation, pursuant to the writ of error filed in the clerk's office of the supreme court of the Territory of Utah, at Salt Lake City, Utah, wherein The Rio Grande Western Railway Company is plaintiff in error and you, the said Frank Leak, are defendant in error, to show cause, if any there be, why a judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 20th day of Sept., in the year of our Lord one thousand eight hundred and ninety-three.

{ Seal Supreme Court, Territory of Utah, United States of America. }

C. S. ZANE,
Chief Justice Supreme Court of Utah Territory.

Attest: JOSEPH P. BACHE,
Clerk of Supreme Court of Utah.

Due service of a copy of the above citation acknowledged this 2nd day of October, A. D. 1893.

O. W. POWERS & OGDEN HILES,
Att'ys for Defendant in Error.

110½ [Endorsed:] Supreme court Utah. Frank Leak, resp't, *vs.* Rio Grande Western Railway Co., app'l't. Citation. Original. Filed Sept. 20th, A. D. 1893. Jos. P. Bache, clerk. Filed after service, Oct. 2nd, 1893. Jos P. Bache, clerk.

111 In the Supreme Court of the United States.

THE RIO GRANDE WESTERN RAILWAY COMPANY, Plaintiff in Error,
vs.
FRANK LEAK, Defendant in Error.

Now comes The Rio Grande Western Railway Company, plaintiff in error, by its attorneys, and says that in the record and proceedings in the above-entitled matter there is manifest error in this, to wit:

The supreme court of Utah Territory erred in affirming the judgment of the district court of the third judicial district of Utah Territory in this action because said last-named court erred in instructing the jury as follows, to wit:

2. In determining the question of negligence, both on the part of the plaintiff and defendant, you should consider all the circumstances under which the defendant caused the acts to be performed as alleged in the complaint and under which its agents or servants failed to act, if you find that they did fail in such respect. You have a right to take into consideration the conditions surrounding the injury, the situation of the parties, the location of both the railroad tracks and the wagon road, if you believe there was a wagon road from the evidence, and their location with respect to each other, and the fact that the plaintiff was hauling ore, if you believe that he was (as to that, I presume, there is no dispute); you have a right to take into consideration the cars of the defendant and their situation and location upon the ore track; you have a right to take into consideration the crossing, as to whether the defendant placed the crossing there for the plaintiff and others to travel over and upon the wagonway, if you believe there was a wagonway on which persons usually traveled, and that the plaintiff at the time of the injury was travelling upon the wagonway. You have a right to take into consideration the fact that the train of cars, one of which struck plaintiff's wagon (as to that, I presume, there is no dispute)—you have a right to take into consideration the fact that it came down grade without an engine attached to it, and then passed up a slight grade at the time it struck the plaintiff's wagon, if you believe from the evidence that it did so pass down and up.

It is your duty to take into consideration all of the evidence bearing upon the question of negligence, and in the light of it
112 all you must determine whether the defendant was guilty of the negligence charged or whether the plaintiff was guilty of negligence contributing to the injury.

II. The supreme court of Utah Territory erred in affirming said judgment because the trial court erred in instructing the jury as follows, to wit:

8. "If you find the issues for the plaintiff you should consider the extent of the injury as it appears from the evidence, whether it is permanent or temporary; you have a right also to take into consideration the physical pain and mental anguish caused by the in-

jury and the extent which the plaintiff has been deprived of the capacity to earn a living or to accumulate money or other property; you have a right to take into consideration the injury to his property, the fact that his horse was killed, the injury to the wagon and the harness, if you believe from the evidence they were injured, and so considering all the evidence with respect to the injury of the plaintiff and his property, as described in the complaint, you should give him such compensation as will remunerate him for the injury sustained; you must look at it in a pecuniary point of view, estimating his loss in money."

And erred in instructing the jury therein that they might include in their verdict compensation to plaintiff for injury to his harness.

III. The supreme court of Utah Territory erred in affirming the judgment because the trial court erred in refusing to instruct the jury in accordance with defendant's request as follows:

1. It was the duty of the plaintiff before he crossed the line of defendant's railway or approached it so closely that he might be injured by cars passing thereon to look and listen up and down the track for approaching cars, and if he failed to so look and listen just prior to and up to the time of the accident, and if by so doing he could have discovered the approaching cars in time to have avoided the accident, his failure to so look and listen was negligence contributing to his injury and your verdict must be for defendant, unless you believe that defendant's servant in charge of said cars discovered plaintiff's danger in time to have avoided the accident by the use of ordinary care.

IV. The supreme court of Utah Territory erred in affirming the said judgment because the trial court erred in refusing to instruct the jury in accordance with defendant's request, which was as follows, to wit:

2. If before crossing defendant's line of railway or approaching the same so closely that he might be injured by cars passing
113 thereon the plaintiff did look and listen for approaching cars and ascertained that such cars were approaching or might have so ascertained, if he had looked and listened with ordinary care, then it was negligence for the plaintiff to drive so close to such railway as to be injured by passing cars, although the plaintiff may have believed that he could succeed in crossing said line before the cars reached the place of collision, and your verdict must be for defendant, unless you believe that defendant's servant in charge of said cars discovered plaintiff's danger in time to have avoided the accident by the use of ordinary care.

V. The supreme court of Utah Territory erred in affirming the said judgment because the trial court erred in refusing to instruct the jury in accordance with defendant's request, which was as follows, to wit:

4. If the plaintiff was injured at a point in the defendant's yard where he had not been licensed or authorized by defendant to go, then defendant would not be liable for an injury to him by passing cars unless defendant's servants in charge of said cars knew of

plaintiff's danger in time to have avoided the accident by the use of ordinary care.

VI. The supreme court of Utah Territory erred in affirming said judgment because the trial court erred in refusing to instruct the jury in accordance with defendant's request, which was as follows, to wit:

6. If the defendant licensed the plaintiff to go with his team in that portion of its yard where plaintiff was injured, yet defendant would not be liable to plaintiff for any injury resulting to him from any condition of the premises known to plaintiff or from the ordinary nature of the business carried on by it there.

VII. The supreme court of Utah Territory erred in affirming said judgment because the trial court erred in refusing to instruct the jury in accordance with defendant's request as follows, to wit:

7. You are instructed to find a verdict for the defendant.

114 The evidence showed that plaintiff was guilty of contributory negligence, and for that reason said instructions should have been given. It appeared from the evidence that the plaintiff for a year and a half prior to the accident had driven a team about the railroad yard where he was injured, was familiar therewith and with the manner of switching therein; that he knew of the particular method of switching which caused his injury and which is claimed to have been negligent, and yet, so knowing, drove so close to the railroad track as to be caught by a passing car and without either looking or listening for such cars, and that if he had used ordinary precautions of looking or listening for such cars or paid any attention to the switching then being done he could have known of the danger and could have escaped.

VIII. The supreme court of Utah Territory erred in affirming said judgment because the trial court erred in refusing to instruct the jury as requested by defendant as follows, to wit:

9. If the plaintiff saw the cars coming and knew that there was danger of a collision or by the use of ordinary care could have so seen and known in time to escape therefrom by leaving his wagon, and if, notwithstanding such danger, he remained in his wagon for the purpose of attempting to save his wagon or horses, then you should not find a verdict in favor of plaintiff in respect to any injury to his person unless you believe from the evidence that the brakeman in charge of said cars saw plaintiff's danger in time to have avoided the accident by the use of ordinary care.

Wherefore the said The Rio Grande Western Railway Company prays that the judgment of the supreme court of Utah Territory be reversed and said court be directed to reverse the judgment of the district court of the third judicial district of Utah Territory and to grant a new trial therein.

C. W. BENNETT,
J. A. MARSHALL,
WILLIAM M. BRADLEY,
Attorneys for Plaintiff in Error.

114½ [Endorsed:] 14th Sep. Supreme Court United States. Rio Grande Western Railway Company, pl'tiff in error, *vs.* Frank Leak, def't in error. Assignment of errors and prayer for reversal. Filed Sept. 14th, 1893. Jos. P. Bache, clerk.

115 In the Supreme Court of Utah Territory.

FRANK LEAK, Respondent,
vs.
THE RIO GRANDE WESTERN RAILWAY COMPANY, Appellant.

Know all men by these presents that we, The Rio Grande Western Railway Company, as principal, and The American Surety Co. of New York, as surety, a corporation duly organized and existing under and by virtue of the laws of State of New York, are held and firmly bound unto the above-named Frank Leak in the sum of $20,000, to be paid to the said Frank Leak, his executors, administrators, or assigns; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our successors, assigns, heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated September 18th, A. D. 1893.

Whereas the above-named The Rio Grande Western Railway Company has sued out a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of Utah Territory:

Now, therefore, the condition of this obligation is such that if the above-named The Rio Grande Western Railway Company shall prosecute the said writ of error to effect and answer all the damages and costs if it fail to make its plea good, then this obligation shall be void; otherwise the same shall be and remain in full

116 force and virtue.

THE RIO GRANDE WESTERN RAILWAY COMPANY,

[SEAL R. G. W. R'Y CO.] By W. F. COLTON,
Assistant Secretary.

Approved Sept. 20, 1893, by—

C. S. ZANE,
Chief Justice of the Supreme Court of Utah Territory.

[SEAL SURETY CO.] THE AMERICAN SURETY COMPANY OF NEW YORK,
By HENRY W. HOBSON, *Vice-Pres.*

Attest: JOHN BELL,
Local Secretary.

STATE OF COLORADO, } ss:
County of Arapahoe, }

Henry W. Hobson, resident vice-president of the American Surety Company of New York, the surety in the foregoing bond, being first

duly sworn, deposes and says that said surety company is a corporation of the State of New York duly and legally carrying on the business of a surety company; that affiant is the vice-president of said company, who, together with John F. Bell, resident assistant secretary, are authorized to execute the above bond on behalf of said company; that said surety company is authorized by its articles of incorporation and its by-laws to execute the above bond, and the said company has assets consisting of capital paid up in cash and a surplus over and above all of its liabilities exceeding the sum of two million ($2,000,000) dollars.

HENRY W. HOBSON.

Subscribed and sworn to before me this 18th day of September, A. D. 1893.

FRANK B. GIBSON,
Notary Public.

My com. expires March 8th, 1893.

Endorsed: Title court and cause. Supersedeas bond. Filed Sept. 20th, 1893. Jos. P. Bache, clerk, by John C. Shipp, dep. cl'k.

117 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the Territory of Utah, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, between Frank Leak, as plaintiff and respondent, and The Rio Grande Western Railway Company, as defendant and appellant, a manifest error hath happened, to the great damage of the said Rio Grande Western Railway Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, with- sixty (60) days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the U. S. should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 14th day of September, in the year of our Lord one thousand eight hundred and ninety-three.

{ Seal Supreme Court, Territory of Utah, United States of America. }

JOSEPH P. BACHE,
Clerk of the Supreme Court of the Territory of Utah.

117½ [Endorsed:] Supreme court, Utah. Frank Leak, resp't, *vs.* Rio Grande Western Railway Co., app'l't. Writ of error. Filed in my office and copy lodged with me this 14th day of Sept., 1893. Joseph P. Bache, clerk.

118 UNITED STATES OF AMERICA:

TERRITORY OF UTAH, } ss:
County of Salt Lake, }

I, Joseph P. Bache, clerk of the supreme court of said Territory of Utah, in pursuance of the attached writ of error, do return, annexed hereto and to said writ, the original citation, a transcript of the record, the proceedings, opinion, assignment of errors, supersedeas bond, all in and of said court in the cause in said writ described to the Supreme Court of the United States, and I hereby certify that said annexed transcript of said record, proceedings, opinion, assignment of errors, and bond is a full, true, correct, and complete copy of the several originals thereof on file or of record in my office.

In witness whereof I hereunto set my hand and the seal of said supreme court of the Territory of Utah this 3rd day of October, A. D. 1893, at Salt Lake City, Utah.

{ Seal Supreme Court, Territory of Utah, United States of America. }

JOSEPH P. BACHE,
Clerk of Supreme Court of Utah Territory.

Endorsed on cover: Case No. 15,426. Utah Territory supreme court. Term No., 285. The Rio Grande Western Railway Company, plaintiff in error, *vs.* Frank Leak. Filed October 14, 1893.

FILED.
MAR 5 1896
JAMES H. McKENNEY,
CLERK.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 285.

THE RIO GRANDE WESTERN RAILWAY CO.,
PLAINTIFF IN ERROR,

VS.

FRANK LEAK, DEFENDANT IN ERROR.

BRIEF OF PLAINTIFF IN ERROR.

C. W. BENNETT,
Attorney for Plaintiff in Error.

Star Printing Co.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 285.

THE RIO GRANDE WESTERN RAILWAY CO.,
PLAINTIFF IN ERROR,

vs.

FRANK LEAK, DEFENDANT IN ERROR.

BRIEF OF PLAINTIFF IN ERROR.

The defendant in error sued for damages for injuries to himself and his property, received in a collision between a train of plaintiff in error and a wagon driven by him. The ground of the action was negligence in managing the train. The negligence was denied and contributory negligence alleged.

The collision occurred in the railroad yard in a mining camp and where the yard and tracks occupied, to the full capacity, the bottom and sides of a narrow gulch. The map, Exhibit "A", transcript page 46, accurately shows the yard and tracks. The general course of the tracks, in the gulch, is northerly and southerly. The most westerly

is called the "main track;" the short middle track east of the depot is called the "ore track," on which, between the plank crossing, ore cars are set for loading. The more easterly or third track is called the switch track, and the northeasterly extension of this, from the north switch, is referred to as the Winnamuck track; while the most easterly track from the switch southerly to the tool house is referred to as the "grade" or "tramway" track, and on this transfers from tramway cars are made.

The train arrived daily about 11 a. m. and then did the necessary switching. The daily method of switching was by pushing the cars north on the switch track beyond the switch and onto the Winnamuck track, then switching the engine onto the tramway track, and letting the cars down the switch track by gravity; after which the engine came back to the switch track. There was no other way to change the engine to the north of the cars.

The grade of the switch track from station 1 (a point about half way between the cross section G. D. and the northerly planked crossing) rises both northerly and southerly; and from there to station 6 on the Winnamuck track, northeasterly, is two and six-tenths feet per hundred. From station 1. southerly to "O" a distance of about one hundred feet the grade rises to the south two feet to the hundred.

On the day in question the ore track was practically filled between the planked crossings with cars to be loaded. There was no highway in the yard, the wagon road being westerly of the gulch as shown. The yard was used by ore haulers and teamsters for the purpose of delivering or receiving freight. There were at this time some ten or twelve teams hauling and delivering ore, and each usually hauled two loads per day. They could unload on the east side of the ore track, but the usual way was to come from the south, following the branch of the wagon track, be-

tween the main and ore tracks, and unload on the west side of the ore cars. There were several ways to get out. When cars were not standing on the main track they could drive up, back onto the main track and turn and go out the way they came in. The testimony tends to show that, on the day in question, there were cars on the main track, and that this course was not open. They could follow the wagon road north, crossing the main track and creek and get to the main road. This was further than the one usually adopted, which was, to turn to the right around the north end of the ore cars at the planked crossing, follow south between the ore and switch tracks and go out at the south crossing southwest of "A 4." The last point at which a wagon could stand safely between cars coming down the switch track by gravity and the cars standing on the ore track, is "A 4" or a little south of that point.

The plaintiff below had hauled ore for a year and a half and usually went out this way. On the day in question he was driving out this way, and five cars came down the switch track, the corner of one catching the corner of his wagon at a point west of "A 4" and crushing the wagon and team between the moving cars and the cars on the ore track. The empty cars coming down the switch track made considerable noise and the wagon of the plaintiff below, in driving over the rough yard made a rattling noise. All the witnesses knew the method of switching, the time of day at which it was done, and that no engine was used in letting down the cars. The distances to which the plaintiff below could see up the switch track are shown on Exhibit "A," and in the testimony, transcript, pages 32, 33. In crossing around the ore cars, he could see up to the switch 253 feet. When he reached "A 2" he could see up to "A 2" 347 feet by looking back; when he reached "A 3" he could see back to "A 3" 421 feet; when he

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tween the main and ore tracks, and unload on the west side of the ore cars. There were several ways to get out. When cars were not standing on the main track they could drive up, back onto the main track and turn and go out the way they came in. The testimony tends to show that, on the day in question, there were cars on the main track, and that this course was not open. They could follow the wagon road north, crossing the main track and creek and get to the main road. This was further than the one usually adopted, which was, to turn to the right around the north end of the ore cars at the planked crossing, follow south between the ore and switch tracks and go out at the south crossing southwest of "A 4." The last point at which a wagon could stand safely between cars coming down the switch track by gravity and the cars standing on the ore track, is "A 4" or a little south of that point.

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reached "A 4" (the last point of safety if the cars overtook him) he could see up the Winnamuck track to "A 4" a distance of 485 feet.

Beside the conductor who was letting the cars down, there were two observers of the collision with exceptionally good opportunities for observation: one was unloading his wagon on the east side of the ore cars, and probably near "A 3" or between that point and the cross section, and one on the bank west near the tool house and about the height of a car above the ore track.

Thus far, the facts are considered uncontroverted.

Other facts are deemed fairly deducible and will be referred to later.

ASSIGNMENT OF ERRORS.

Now comes the plaintiff in error above named and upon the record and proceedings of the Supreme Court of the Territory of Utah, assigns the following errors:

I.

The court erred in not reversing the trial court because the said trial court refused to instruct the jury as requested by the defendant by its requests numbered 1 and 2 as follows:

> "1.—It was the duty of the plaintiff before he crossed the line of defendant's railway or approached it so closely that he might be injured by cars passing thereon, to look and listen up and down the track for approaching cars, and if he failed to so look and listen just prior to and up to the time of the accident, and if by so doing he could have discovered the approaching cars in time to have avoided the accident his failure to so look and listen was negligence contributing to his injury, and your verdict must be for defendant, unless you believe that defendant's servant in charge of said

cars discovered plaintiff's danger in time to have avoided the accident by the use of ordinary care."

"2.—If before crossing defendant's line of railway or approaching the same so closely that he might be injured by cars passing thereon, the plaintiff did look and listen for approaching cars and ascertained that such cars were approaching or might have so ascertained, if he had looked and listened with ordinary care, then it was negligence for the plaintiff to drive so close to such railway as to be injured by passing cars, although the plaintiff may have believed that he could succeed in crossing said line before the cars reached the place of collission, and your verdict must be for the defendant, unless you believe that defendant's servant in charge of said cars discovered plaintiff's danger in time to have avoided the accident by the use of ordinary care."

Record. p. 44.

II.

The court erred in not reversing the judgment of the trial court because said trial court instructed the jury as requested by the plaintiff in its request No. 4 as follows:

"You have a right to take into consideration he was traveling upon the traveled way usually traveled by persons hauling ore to this train; you have a right to take into consideration the observation that he made, so far as the evidence shows it, whether he looked out as he should have done for the danger of coming cars, or whether he listened, you should take into consideration all of the circumstances, all that he done and all that he failed to do in order to determine whether he acted with due care or was guilty of negligence."

Record p. 42.

III.

The court erred in not reversing the judgment of the trial court, because said trial court refused to instruct

the jury as requested by the defendant by its request No. 6, as follows:

> "6.—If the defendant licensed the plaintiff to go with his team in that portion of its yard where plaintiff was injured yet defendant would not be liable to plaintiff for any injury resulting to him from any condition of the premises known to plaintiff or from the ordinary nature of the business carried on by it there."
>
> Record p. 44.

IV.

The court erred in not reversing the judgment of the trial court because said trial court refused to instruct the jury as requested by the defendant by its request No. 9, as follows:

> "9.—If the plaintiff saw the cars coming and knew that there was danger of a collision, or by the use of ordinary care could have so seen and known in time to escape therefrom by leaving his wagon, and if notwithstanding such danger he remained in his wagon for the purpose of attempting to save his wagon or horses, then you should not find a verdict in favor of plaintiff in respect to any injury to his person, unless you believe from the evidence that the brakeman in charge of said cars saw plaintiff's danger in time to have avoided the accident by the use of ordinary care."
>
> Record p. 45.

V.

The court erred in not reversing the judgment of the trial court, because said trial court refused to instruct the jury as requested by the defendant by its request No. 8, as follows:

> "8.—You are instructed to find a verdict for the defendant."
>
> Record p. 44.

BRIEF OF ARGUMENT.

The following additional facts are claimed to be proven:

That the defendant in error knew the daily custom of switching at this time of day; that he did not look back at all from the time he turned around the north end of the line of ore cars; that when he knew he was in danger he drove on and took his chances without looking to see what the chanecs were; also that at no time did the cars attain a speed of more than seven or eight miles an hour, and that it was not the collision that stopped the cars, but that they were stopped by the brakes and the adverse grade from station "O" southerly.

The plaintiff below in his testimony, pages 28, 29, though he had hauled ore there for a year and a half, endeavored to carry the impression he did not know the cars were always let down by gravity and without the engine. The witness in his direct examination says nothing about looking up the track. On the cross-examination, (bottom of p. 27) he says: "When I looked up the Winnamuck track I saw nothing. After I started to drive south I looked at the engine. It was standing on the tramway track. In going to the south I looked to the left of me." This shows that he did not look up the track at all, after turning, for had he done so the cars just beyond the upper switch were in plain sight. His witness Madsen (top of page 9 and again at page 11) says: "I didn't see Leak turn around until the cars struck the hind end of his wagon." This witness was so excited that many of his details, such as the speed of the train, and that Leak reached for his whip and whipped up his horses after the wagon was struck, are somewhat distorted but the fact that Leak was giving no heed to the danger he was in was a thing he could not fail to see.

The witness Bippus (page 38 *et seq.*) is clear and circumstantial. Leak did not look back or around or see the witness, and the witness could not even make him hear. When nearing the point of danger Leak turned his head to the left, and then began to urge his horses. Why did he do this? Then he saw the engine on the Winnamuck track and knew the method of switching and that the cars would be down. This explains Leak's testimony that in driving south he looked to the left and at the engine on the Winnamuck track, and his testimony (lines 3 to 5, page 28) in which he endeavors to carry the impression he looked back a second time, but without stating it directly. It also explains Madsen's testimony that he whipped up his horses after the wagon was struck, which was only a misplaced truth It also shows Leak knew the danger from the cars when the engine was detached and run onto the tramway track, and that his pretended ignorance of that fact was an evasion. It is probable he thought he would still have time to cross, but then, a glance backward would have disclosed that, insteading of whipping up his horses, he should stop.

As to the speed of the cars, Madsen (line 4, page 10) estimates 20 to 25 miles per hour, but he was so excited he could not speak. The court below says unqualifiedly that the cars were running 20 miles per hour.

John Fitzgerald, a witness for plaintiff below estimated the speed at ten miles. The surveyor (near bottom of page 32) and without notice to trainmen (near bottom of page 34) took observations indicating the usual speed is 6 miles per hour.

Stowe, the conductor, who was letting the cars down says (page 37) the greatest speed would be before he got the second brake set, and at no time more than seven or eight miles per hour. He says (page 36) the collision with

the wagon was not felt and would not affect the motion of the train. Some of the witnesses thought the train was stopped by the collision. Other witnesses saw no brakeman until he was on the box car. The conductor had set three brakes on the flat cars, in front, and was setting the brake on the first box car when the wagon was hit, but in the excitement he was not noticed until seen climbing the box car. The train stopped, practically in the cradle of the two grades. If a velocity of twenty miles per hour had been obtained, and only the obstruction of a wagon had intervened, this would have been impossible.

The conductor denies the testimony of Madsen (page 40) and the statement is too improbable to be true, and Madsen was not in a state of mind to understand what was said. No other witness heard such a statement.

I.

The Supreme Court of Utah affirmed the refusal of the trial court to give the first and second instructions asked by the defendant in that court, which instructions are set out in the first assignment of error above, and this is assigned as error:

That instruction expressed what has become a rule of law and was carefully modified, even beyond what may have been required, by the concluding part of the instruction, and the evidence justified the request.

Railroad Co. vs. Houston, 95 U. S. 697.
Schofield vs. C. M. & St. P., 114 U. S. 615.
Elliott vs. C. & M. R'y Co., 150 U. S. 245.

The rule applies to a side track as well as to the main line.

Minning vs. Detroit R'y Co., 59 Mich., 257.

The second instruction was to the point that if the plaintiff below did see, or with ordinary care could have seen the cars, and took the chance of crossing, his error in judgment does not relieve him from negligence.

II.

The court erred in affirming the instruction given in the trial court and set out in the second assignment of error, supra.

By this the jury was told that in considering the question of the plaintiff's negligence, they might take into consideration whether he looked out as he should have done for the coming cars, or listened, etc., in order to determine whether he was negligent.

There is nothing elsewhere in the charge informing the jury what the defendant should do, or whether he should stop, or look or listen, or what effect should be given to a failure to do so; and if the jury found he did neither, it was left to them only as a circumstance among others to be considered, and still a verdict might be rendered for the plaintiff.

If defendant's instructions been given, the jury would have had a means of interpreting this instruction, but the refusal of those instructions left them without any guide as to this one.

III.

The instruction No. 6, set out in the third assignment of error should have been given. It related only to the condition and situation of the tracks and yard, and not the question of negligent operation.

IV.

The testimony of Charles F. Bippus, (transcript page 38) and of the plaintiff himself, shows he could have es-

caped by jumping from his wagon, and the ninth instruction asked by defendant on the trial, set out in the fourth assignment of error, supra, should have been given.

It is true that in the surprise of danger suddenly arising a person is not bound to the use of the best means of escape that reflection might suggest, but that was a question to be considered by the jury in determining whether the plaintiff below used proper care.

V.

The fifth assignment of error is based on the claim that the evidence conclusively showed the plaintiff below was negligent.

C. W. BENNETT,
Attorney for Plaintiff in Error.

FILED.
FEB 6 1896
JAMES H. McKENNEY,
CLERK.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 285.

OCTOBER TERM, 1895.

RIO GRANDE WESTERN RAILWAY COMPANY, A CORPORATION, PLAINTIFF IN ERROR,

vs.

FRANK LEAK, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF UTAH TERRITORY.

BRIEF OF DEFENDANT IN ERROR.

ORLANDO W. POWERS,
Counsel for Defendant in Error.

Star Printing Co., 143 S. West Temple.

IN THE SUPREME COURT OF THE UNITED STATES.

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BRIEF OF DEFENDANT IN ERROR.

ORLANDO W. POWERS,
Counsel for Defendant in Error.

STATEMENT OF FACTS.

The defendant in error sued the plaintiff in error in the Third Judicial District Court of Utah Territory, for $20,370 damages which he alleges he sustained in consequence of injuries to his person and property, occasioned by the negligence of the plaintiff in error.

The defendant in error alleges in his complaint:

That the Rio Grande Western Railway Company is a corporation of Utah, and is the owner of a railroad in Bingham Canyon, Salt Lake County, Utah, with the cars

and appurtenances belonging thereto, and was engaged in the business of running and operating the same at the time of committing the trespass complained of.

That on the 11th day of July, A. D. 1891, the defendant in error was engaged in his occupation of hauling ores to the cars of the plaintiff in error, situate on its track, and was traveling with his team of two horses and a wagon on a road usually traveled, and one provided by the plaintiff in error to be traveled in the business of hauling ores to, and loading the same onto such cars. That the defendant in error, as he was so traveling on such business, reached a point on the wagon road near to where it crosses the railroad track; when the plaintiff in error carelessly, and negligently caused a train of cars to pass rapidly over the track, and omitted, whilst the train was approaching the crossing, to give warning of its approach, or to slacken its speed, and by reason thereof the defendant was unaware of its approach, and in consequence thereof, the train of cars, without any fault on his part, struck the defendant in error, and his horses and wagon, and threw him with great force upon the ground, and underneath the wagon and cars, and that thereby, he was greatly bruised, crushed and maimed, insomuch, that it became necessary to cut off his left leg, and that thereby there was inflicted upon him lasting bodily injuries, to his damage in the sum of $20,000 and that at the same time, one of his horses was killed, to his damage in the sum of $150, and that his wagon was destroyed to his damage in the further sum of $115, and, that thereby he was compelled to expend $105 for surgical and medical attendance, making in all the sum of $20,370 for which he prayed judgment.

On the trial in the District Court the jury found the issues in the favor of the defendant in error, and assessed his damages in the sum of $13370, and costs of suit.

The plaintiff in error made a motion for a new trial in the District Court, on the ground that the damaged assessed was excessive, and thereupon the trial court ordered, that if the defendant in error should abate or remit upon the record $3,000 of the amount assessed by the jury, the motion for a new trial would be overruled, and thereupon the defendant in error abated or remitted the $3000, and thereupon the motion for a new trial was overruled and judgment was entered in his favor and against the plaintiff in error for $10,370 and costs, and thereupon, from the order overruling the motion of plaintiff in error for a new trial and from the judgment aforesaid, it appealed to the Supreme Court of Utah Territory, where, upon full consideration, the order and judgment of the District Court were affirmed, and from the latter judgment the plaintiff in error has appealed to this court.

Bingham Canyon is a narrow defile in the mountains in Salt Lake County, Utah, extending in a southwesterly and northeasterly direction. In this canyon, the plaintiff in error had, at the place where the disaster occurred, three parallel tracks, one of them being designated in the record as the "main track," and another to the east of it called the "ore track," and still another to the east of the latter, called the "switch track."

Between the "main track" and "ore track" there was a well traveled wagon road. There was also a well traveled wagon road between the "ore track" and the "switch track."

The plaintiff in error had placed cars on the "ore track" for the purpose of being loaded with ore from the wagon of the defendant in error. In carrying on this work, the defendant in error came down the canyon along the road between the "main track" and "ore track," and from

there unloaded his wagon into the cars standing on the "ore track;" and after unloading, he would proceed in a northeasterly direction to a plank crossing on the "ore track," and there cross the same, and would then turn and go up the canyon, between the "ore track" and "switch track," for the purpose of reloading his wagon with ore. All the roads and crossings by which Mr. Leak moved about in carrying on this business, were provided for him by the plaintiff in error, as well as for the public generally.

The distance at the widest point, between the "main track" and the "ore track" is about 22 feet, and the widest place between the rails of the "ore track" and "switch track" is about eleven (11) feet, and the distance between the sides of the cars standing or moving opposite each other on the two last named tracks is about six (6) feet four (4) inches.

From a point marked on the map or diagram, there is an extension in a northeastery direction of the "switch track," which extension, is called the "Winnemuck track." It was the custom of the plaintiff in error, in switching or shunting its cars on its premises in Bingham Canyon, by means of a locomotive, to push empty cars up the steep grade of the "Winnemuck track" to a point where it makes a junction on the hillside with a track called the "tramway track," and then to detach the locomotive from such empty cars, run the locomotive off onto the "tramway track," and then to permit the cars to move by their own gravity down the "Winnemuck track," onto the "switch track," and so on southerly and beyond a point where the "switch track" joins and crosses the "ore track," and it was such a moving train of cars, which caused the disaster and injuries to Mr. Leak.

At the time of the disaster, there were cars standing

on the "main track" and there were cars also standing on and occupying the whole extent of the "ore track" from crossing, to crossing, so, that it was not practicable for Mr. Leak to have turned his team around between the "main track" and "ore track", and to have gone back up the canyon by the road whence he came, and besides that was not the usual way of return.

At about 11 o'clock on the 11th day of July, 1891, Mr. Leak drove down the canyon with a wagon load of ore, on the road between the "main track" and the "ore track," and unloaded it into one of the cars on the ore track.

After unloading, he drove across the northerly crossing of the "ore track," and turned southerly along the road between the ore and switch tracks, and thus started back up the canyon. Whilst he was so traveling, a train of five or six box and coal cars, which had been detached from the locomotive on the "Winnemuck track", was, by the servants of the plaintiff in error, run rapidly down the grade onto the "switch track," and thereby Mr. Leak with his team, when near the southerly crossing of the ore and switch tracks, was caught between the rapidly moving cars on the switch track, and the cars standing on the ore track and thereby suffered the injuries complained of.

ARGUMENT.

The defendant in error alleged in his complaint, that the disaster was occasioned by the negligence of plaintiff in error, and that himself was without fault, and the jury foudd the issues in his favor.

The evidence amply justifies the verdict of the jury as to the fact of negligence. There is no substantial conflict in the evidence by which the negligence of plaintiff in error, and the faultlessness of Mr. Leak were proved; but

if even if there were a conflict, this court will not disturb the findings of the jury.

II.

It is respectfully insisted, that there is no prejudicial error in this record in respect of instructions to the jury, which were given or refused by the court.

The first assignment of error relates to that part of the second instruction given by the court, wherein it said,

> "In determining the question of negligence, both on the part of the plaintiff and defendant, you should consider all the circumstances under which the defendant caused the acts to be performed, as alleged in the complaint, and under which its agents or servants failed to act, if you find they did fail to act in such respect."

This part of the instructions, in order to be rightly understood, must be read and considered in the light of the context. The first and second of the instructions given by the trial court constitute but one entire charge, on but one branch of the case, namely, the case which is alleged in the complaint.

The part which is excepted to does not seem to be objectionable, but if it be so, it is obviously unfair to consider the part aside from the whole charge.

Where the charge as a whole, fully and fairly submits the law of a case, the judgment will not be reversed because extracts apart from their connection and qualification.

Evanston vs. Gunn, 99 U. S 660.
Railroad vs. Mackey, 157 U. S. 72-87.

If there was any ambiguity in the charge, the plaintiff in error should have asked the trial court to explain the point.

Railroad Co. vs. Mackey, Supra.

Moreover,

"Mere verbal criticisms of the charge of the judge, are not entitled to any considerable weight in a court of errors.

"Such courts, look at the substance and legal effect of the language employed, without much regard to mere inaccuracy of expression, unless the error is one which might prejudice the rights of the party seeking redress."

Unitarian Society vs. Faulkner, 91 U. S. 415-421.

III.

The second assignment of error relates to an error in the record which is not prejudicial and on its face is a matter of trifling consequence.

The record in the cause shows that during the trial counsel for defendant in error, by inadvertance asked him, when testifying, what the damage was to the harness of his team, and thereupon, Mr. Leak said it was thirty-five dollars, and thereupon, the plaintiff in error moved that that testimony be striken out, as not being an element or item of damage which Mr. Leak had pleaded in his complaint. The court ordered the testimony to be stricken out, and instructed the jury to disregard it.

Printed record page 40; original, 46.

Now when the Judge came to instruct the jury, he by a like inadvertance in his eighth instruction, mentioned the harness.

See 8th Instruction, page 43 of printed Record.

Although this was an error, it was not prejudicial, and was but a trifling matter at most.

It is obvious the jury took no notice of it in making up their verdict, because their finding shows, they first gave Mr. Leak $13,000 of the $20,000 which he claimed by reason of the injury to his person. Second, $150 for killing

one of his horses. Third, $115 for destruction of his wagon. Fourth, $105 for money laid out for medical and surgical attendance, making in all $13,370, and thus leaving the harness item entirely out of the account.

The error not being prejudicial to plaintiff in error, is not reversible error.

Grand Trunk Railway Co. vs. Ives, 144 U. S. 409-428.

The evidence concerning the harness was stricken out. It was not a matter of fact in the case.

The judgment of the court below will not be disturbed by reason of an erroneous instruction given, which is not applicable to the facts of the case.

People vs. March, 6 Cal. 544.

Though there be plain error, yet if the right charge would not have changed the result of the trial, it is not ground for a reversal.

Decatur Bank vs. St. Louis Bank, 21 Wall. 294.
Brobst vs. Brock, 10 Id. 519.

Even though this court should hold that the mention of the harness in instruction 8 is prejudicial error, it would not on that ground reverse the cause, but would at most direct the judgment to be abated or modified to the amount of $35.

Further argument on this point seems unnecessary.

IV.

The third assignment of error is made on the refusal of the Trial Court, to charge the jury as requested by plaintiff in error as follows:

"It was the duty of the plaintiff before he crossed the track of defendant's railway, or approach so closely that he might be

injured by cars passing thereon, to look and listen up and down the track for approaching cars, and if he failed to so look and listen just prior to and up to the time of the accident, and if by so doing he could have discovered the approaching cars in time to have avoided the accident, his failure to so look and listen was negligence contributing to his injury, and your verdict must be for defendant, unless you believe that defendant's servant in charge of said cars, discovered plaintiff's danger in time to have avoided the accident by the use of ordinary care."

The refusal to give this request to charge was not error, for the reason, that the court gave substantially the same instruction, but in better form than in the request.

The charge which the court gave was as follows:

"The court further charges you, that though the defendant may have been guilty of negligence that contributed to the injury, yet, if the plaintiff was also guilty of negligence, he cannot recover; and in determining whether he acted with due care, you may take into consideration the circumstances under which he was acting; you have a right to take into consideration that he was traveling upon the traveled way usually traveled by persons hauling ore to this train; you have a right to take into consideration the observation that he made, so far as the evidence shows it, *whether he looked out as he should have done for the danger of coming cars, or whether he listened*, you should take into consideration all of the circumstances, all that he did, and all that he failed to do, in order to determine whether he acted with due care

"5. The court further charges you that if plaintiff attempted to cross defendant's line of railway, or to approach so near it as injury might have resulted to him, where he should by the exercise of ordinary care see that it was especially dangerous, it was plaintiff's duty to use an amount of care proportioned to the danger.

"Of course, when persons are acting under dangerous circumstances and conditions, it is their duty to act with respect to the danger that surrounds them, and to use a greater degree of care where there is much danger, than where there is but little."

By this the jury were charged that in determining whether the defendant in error was guilty of contributory negligence, they must find from the evidence, whether he looked and whether he listened as he ought to have done for the danger of coming cars.

This, we respectfully submit, is tantamount to saying to the jury, as matters of law, that it was the duty of plaintiff to "look out," and to "listen" for coming cars, and contains all which it was needful to say on that point.

In such case, it is not error to refuse to give further requests to charge.

Hartford Life Annuity Ins. Co. vs. Unsell, 141 U. S. 439.

The evidence shows that the defendant in error, did look and did listen for coming cars. At page 27 of the printed record he says:

> "When I drove around the cars on the ore track to the north, I looked to see if there were any cars on the track. I didn't see any. I looked and listened. I saw the engine. It stood very nearly right straight from where I got caught, on the 'tramway track.' It was not on the 'Winnemuck track.' I saw no cars on the 'Winnemuck track,' and I did not hear any coming."

The court charged the jury further as follows:

> "It is your duty to take into consideration all of the evidence bearing upon the question of negligence, and in the light of it all you must determine whether the defendant was guilty of the negligence charged, or whether the plaintiff was guilty of negligence contributing to the injury."

Printed record page 42.

Among the specific questions which the jury were charged they must consider, in determining whether defendant in error was guilty of negligence contributing to his injury, were the questions:

First. Whether he looked. Second, whether he listened for the "danger of coming cars."

It seems obvious, that this case is one, where the question of whether there was negligence on the part of the complainant which contributed to his injury, must be determined by the jury in the light of all the evidence.

> "When a given state of facts is such that all reasonable men may fairly differ upon the question, as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusions from them, that the question of negligence is ever considered as one of law for the Court."

Grand Trunk Railway Company vs. Ives, 144 U. S. 408-417.

Gardner vs. Railroad Company, 150 U. S. 349-361.
Bunting vs Railway Co., 14 Nev. 351.
Gratiot vs. Railway Co., 16 Lawyers' Rep. 189.

The principles, doctrines, and rules, enunciated by this Court in Railway Company vs. Ives, are peculiarly applicable to the facts in this case, and its conclusions and postulates, seem to countervail every of the assignments of error on this appeal

V.

The fourth assignment of error is alleged on the refusal of the trial court to give the following request to charge:

> "If, before crossing the defendant's line of railway, or approaching the same so closely that he might be injured by cars passing thereon, the plaintiff did look, and listen for approaching cars, and ascertained that such cars were approaching, or might have so ascertained, if he had looked and listened with ordinary care, then it was negligence for the plaintiff to drive so close to such railway as to be injured by passing cars, although the plaintiff may have

believed that he could succeed in crossing said line before the cars reached the place of collision, and your verdict must be for defendant, unless you believe that defendant's servant in charge of said cars, discovered plaintiff's danger in time to have avoided the accident by ordinary use of ordinary care."

There are two capital objections to this request.

First. It is not applicable to the facts.

Second. It is unintelligible.

The argument which we have addressed to the third, seventh and eighth assignments of error seems to suffice to show the inapplicability of this request to charge, to the facts of the case.

Without repetition of it here, we affirm that the argument on the third, seventh and eighth assignments shows, that defendant in error did not "drive so close to such railway as to be injured by passing cars," but that he was driving in the usually traveled road between the "switch" and "ore" tracks.

In respect of the unintelligibility of the request, we have to say, that the best commentary on it, is the request itself.

"*Ordinary use*, of ordinary care" does not seem to convey any definite idea. As well speak of "extraordinary use, of ordinary care."

VI.

The fifth assignment of error is as follows:

V. "The Supreme Court of Utah Territory erred in affirming the said judgment, because the trial Court erred in refusing to instruct the jury in accordance with defendant's request, which was as follows, to-wit:

4. "If the plaintiff was injured in the defendant's yard where he had not been licensed or authorized by defendant to go, then defendant would not be liable for an injury to him by passing cars, unless defendant's servants in charge ef said cars, knew plaintiff's danger in time to have avoided the accident, by the use of ordinary care."

We respectfully invite the attention of this Court to the fact, that this assignment of error was not made on the motion for a new trial in the trial court, nor was it made in the Territorial Supreme Court, but it is for the first time presented in this Court.

The assignment is without truth.

Whether defendant in error had a license to go to the yard and premises of plaintiff in error, was not put in issue by its answer

The defendant in error, alleges in his complaint as follows:

> "That on the 11th day of July, A. D. 1891, this plaintiff was engaged in his business of hauling ore to cars of the defendant situate on its said track, and was traveling with his team of horses and wagon, on a wagon road *usually* traveled and provided by defendant to be traveled in the business of the said hauling of said ores, from (to) said cars and was then, at or about the place where said wagon road crosses the railroad aforesaid, and as the plaintiff had reached said place or crossing, the said defendant carelessly and negligently caused a train of cars to approach said crossing, and then and there to pass rapidly over the track of said railroad, and negligently and carelessly omitted its duty whilst approaching said crossing to give any signals of warning whatever of the approach of said cars, or to stop, or to slacken the speed thereof, by reason whereof this plaintiff, without any fault on his part, was unaware of their approach."
>
> 2nd. Para. of Complaint, page 2 of printed record.

The answer of the plaintiff in error does not deny that defendant in error was hauling ore to its cars, nor does the answer aver that he was a trespasser, or there without license, it denies merely that he was traveling on a road *provided* by plaintiff in error to be traveled.

The answer admits by not denying the allegation of the complaint, that defendant in error was in the due course of his business hauling ore to the cars of the Railway Company, and that he was traveling on a wagon road "*usually traveled in the business of the said hauling of said ores from (to) said cars.*"

At the trial of the cause, it was conceded tacitly, that he was on the premises of plaintiff in error by its invitation, and was carrying on his business there in the usual way, and was in no sense a trespasser on its grounds. There is not a syllable of testimony, nor a suggestion, or

an argument in the whole record, which asserts, or implies that defendant in error was not fully authorized to go to any point in the yard or premises of the Railway Company, but to the contrary, it is admitted upon the face of the pleadings, and proved by the evidence, that he was invited there, and that when he was injured he was engaged in his avocation, and was *traveling in the usually traveled road.*

> "Where the testimony is all one way, a party is not entitled to an instruction assuming that it is otherwise."
>
> Orleans vs. Platt, 99 U. S. 676.
>
> "An instruction which assumes the existence of facts, of which there is no evidence, is erroneous."
>
> R. R. Co., vs. Houston, 95 U. S. 697.
>
> Jones vs. Randolph, 104 Id. 108.

A charge founded on a hypothetical state of facts of which there is no evidence, is erroneous.

United States vs. Brietling, 20 How. 252.

The foregoing considerations seem to justify the criticism, that the plaintiff in error has been hard pressed to find points in the record, in respect of which, to assign error, and that this appeal, has probably been taken for delay merely.

VII.

The sixth assignment of error, is based on the refusal of the trial court, to charge the jury in accordance with the request of the plaintiff in error, as follows:

> "If the defendant licensed the plaintiff to go with his team in that portion of its yard where plaintiff was injured, yet defendant would not be liable to plaintiff for any injury resulting to him from any condition of the premises known to plaintiff, or from the ordinary nature of the business carried on by it there."

Page 44 of printed record.

Instead of giving the request to charge as preferred by the plaintiff in error, the trial court instructed the jury as follows:

> 6. "The court further charges you that the defendant was not liable to the plaintiff under the proceedings of this action, for any defect in the manner of the locating and construction of its track or switches.
>
> "They have not alleged the location or construction of the switches as a cause of action, but it is your duty in order to determine whether the plaintiff or the defendant acted negligently, or with due care, to take into consideration the location of the tracks, and the whole situation as shown by the evidence, in order to determine whether they did act prudently and with good care, or on the contrary, whether they acted with negligence."

We respectfully insist that the refusal of the trial court to give plaintiff's in error request, is not error, because the substance of plaintiff's in error request was given, and further because, the charge given by the court is much more lucid and perspicuous than the request.

There was however, no real necessity for giving any charge at all on that subject, for the simple reason that Mr. Leak does not allege either in pleading or argument, any defect in the construction of the tracks or switches, or roads, as a substantive ground of action or recovery against the Railway Company, he places his right to recover on the sole ground, that plaintiff in error was negligent in running its cars over its track.

Anyway, this objection and exception falls easily within the rule as declared by this court in

Hartford Annuity Ins. Company vs. Unsell, Supra.
Also in Erie Railway Co., vs. Winter, 143 U. S. 75.

VIII.

The seventh assignment of error is made on the refusal

of the trial court to instruct the jury in accordance with plaintiff's in errors request as follows:

"You are instructed to find a verdict for the defendant."

This request is based on plaintiff's in error assertion, that the evidence proves that defendant in error was guilty of contributory negligence.

The argument of plaintiff in error is, that Mr. Leak knew of the method of switching the cars, by gravitation from the "Winnemuck track" onto the "switch track," and yet, with such knowledge he "drove so close to the railroad track as to be caught by a passing car, and without either looking or listening for such cars, and if he had used ordinary precautions of looking or listening for such cars, or paid any attention to the switching then being done, he could have known of the danger and could have escaped."

There is no evidence to support such argument. It is true, that defendant in error knew the method of making the gravity switching from the "Winnemuck track," but the evidence all shows, that he did not know, and could not know of his danger in time to have escaped. He did not "drive so close to the railroad track as to be caught by a passing car," but the fact is, he was *driving in the usually travelled wagon road between the "switch track" and the "ore track,"* and while so driving, the plaintiff in error without warning of any kind, precipitated a train of cars from the "Winnemuck track" down onto and over the "switch track," and thus defendant in error was caught and jammed in, between the swiftly moving train on the "switch track" and the stationary cars on the adjacent "ore track," and under the circumstances, it was impossible for him to have escaped, and the jury so found by their verdict.

The jury in this cause experienced no difficulty in settling the fact against the plaintiff in error.

> "It is well settled that where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fair-minded men will honestly draw different conclusions from them."
>
> Richmond & Danville R. R. vs. Powers, 149 U. S. 43-45.
>
> Railroad Company vs. Stout, 17 Wall. 657.
>
> Railroad Company vs. McDade, 135 U. S. 554.
>
> Railroad vs. Converse, 139 id. 469.

IX.

The eighth and last assignment of error, rests on the refusal of the court to instruct the jury as plaintiff in error requested, as follows:

> 9. "If the plaintiff saw the cars coming and he knew that there was danger of a collision, or by use of ordinary care could have seen and known in time to escape therefrom by leaving his wagon, and if, notwithstanding such danger, he remained in his wagon, and for the purpose of attempting to save his wagon and horses, then you should not find a verdict in favor of plaintiff in respect to any injury to his person, unless you believe from the evidence, that the brakeman in charge of said cars saw plaintiff's danger in time to have avoided the accident by the use of ordinary care."

It was not error to refuse this request to charge, because:

First—It is impertinent, there being no testimony to which it can be applied

Second—Because the substance of the request, so far as it bore on the general question of contributory negligence, was given by the trial court.

Third—The request "is too much upon the weight of the evidence and confines the jury to the particular circumstances narrated, without notice of others that they may think important."

There is no evidence tending to show that defendant in error could have abandoned his wagon, and thus have escaped the bodily injuries.

The witness Peter Madsen testified:

> "At the time of the accident I was on the east side of the 'ore track' unloading ore from my wagon into a car. I should judge there were five or six cars standing on the 'ore track' at that time, and if I remember rightly, they were coal and box cars. The 'ore track' was full of them. I was probably a little north of the middle of the 'ore track.' I saw Leak that day. He was driving by my wagon. My wagon was facing to the north. Leak was going southerly. He went by me, with a team and wagon which was unloaded. Nobody was with him. The next thing that attracted my attention to Leak was, that I looked around, and there was a train of cars coming down the hill, and the thought struck me that Leak's wagon was pretty close to them. I didn't think he would have time to get out of the way before they would catch him, so I turned around to look to see where he was, and he was driving out southerly down the track that the cars were coming on. He was a little to the right of the track, was not noticing anything but his team. By that I mean, he was looking at his team and driving ahead.
>
> "I tried to hollow out to him, but I was a little bit excited, seeing the danger he was in, and my tongue got tied up so that I couldn't get the words out of my mouth, and finally a coal car caught the corner of his wagon, and just as the coal car caught the corner of his wagon, Leak looked around, and he then took his whip and started whipping the horses, but the cars were coming so fast the horses could not get out of the way quick enough and the car that had struck the corner of the wagon, carried the back end of the wagon around so fast that it crushed between the car that stood on the right hand side of Leak on the lower track, and it crushed the wagon and horses and Leak all in a bunch between the two cars. In fact, it crushed him so tight it stopped the cars

almost. I can not say positively how many cars came down the grade, but it looked to me as if there were five or six cars. The first one was a coal car, and I think the next two were coal cars, and then there were one or two box cars. I saw a brakeman on the cars, but saw no one else. If there had been anyone else I think I would have seen them. The brakeman was on top of a box car. It looked to me as if he were looking at Leak. He was looking in that direction. I didn't see him do anything towards stopping the cars. I didn't hear the brakeman say anything at the time of the accident, or just prior thereto, nor did I hear him give any signal or warning of the coming of the cars. If any such signals had been given I would most likely have heard them; still, the cars were rattling considerably as cars will when running. There was nothing else except the rattling of the cars, to have prevented my hearing signals, and I heard no signals. No bells were rung or whistles blown."

Page 9 of printed record.

On his cross-examination the witness said:

"Leak had gotten 58 or 60 feet from me when I first heard the cars coming down. I didn't notice the cars until they got pretty close to me. In fact, I heard them rattle right by me, and I turned around to see if Leak was out of the way. As soon as I noticed the cars I looked at Leak, and then I looked back at the cars. A person will look lively when there is danger. Then I looked at Leak again and saw the collision. I didn't say anything before the cars struck him—if I said anything at all—and I don't think I said anything at all. I was trying to hollow to him to jump. I didn't hollow to him loud enough for him to hear it. I made the attempt as hard as anybody. I kind of stuttered a little and could not get it out. I don't ordinarily stutter. I didn't estimate the speed of the cars, but they were coming at a pretty lively speed.

"I think it is possible that, when I saw this man in danger of getting killed, and could not hollow, that I could at the same time, form a fair judgment of the speed these cars were coming down the hill.

"I saw Leak whipping his horses. I didn't notice that he had his whip in his hand as he passed me. I didn't see Leak turn around before the cars struck the hind end of his

wagon; he then turned his head. After the cars struck his wagon, he hit his horses, and probably hit them twice. I am positive that after the cars hit his wagon, he hit his horses twice before his wagon was knocked over, and he didn't start to whip them before the cars struck the wagon. A man will whip pretty lively when in danger.

"I noticed the brakeman was looking at Leak. I was not excited so I could not notice these things. I had my presence of mind so much as I have now. I tried to warn Leak, but I stuttered. I don't know whether you call it stuttering or tongue tied, or what it was, I know I could not get the words out of my mouth. It must have been twenty minutes before Leak was extricated from the wreck."

Page 11 of printed record.

The defendant in error testified on this point as follows:

"The road I drove on was the one always traveled. After I got turned, I drove along up the track. I didn't hear any noise until the cars were right close on to me. I was in the *usually traveled* way, when the cars got close on to me. I heard the rattling of the cars. I don't know what I did then. The cars were right close onto me. I don't know whether I stopped, or hit the horses, or what I did. I remember the cars striking the wagon and throwing me to the ground, and I remember nothing after that. All I know is, there was a wheel of a wagon stood on my leg and a car on top of it. I couldn't say how long it stood there. The next thing I remember is, that they pried the wagon off me I was then taken to Mr. Mayne's house. I hadn't heard anything until the cars crashed into me. The whistle had not blown, or the bell rung. I wasn't doing anything differently, than I had in hauling ore there for the past year and a half, when I was hit by the cars."

Page 26 of printed record.

Witness Charles F. Bippus testified as follows:

"When I first saw Leak, I was standing on the north side of the tool house, as shown on the plat, and he was just coming past the north chute as shown on the map. I saw the cars at that time and I was going toward the chute. Just before I got to the chute, I saw Leak, and I called to him that the cars were coming down the grade. I called just as soon as

I saw him. I should judge I was about 50 or 60 feet away from him. I can not just say how loud I called My intention was to warn him. I called loudly enough for a man to ordinarily hear at that distance. Leak kept driving on to the south. I did not see him make any motion directly after I called, but after he got up a little farther, he seemed to be urging his horses to go pretty fast, and I called to him a second time. By that time I was up on the track. Just after I called the second time he turned around, and I thought he was picking up his whip. I thought that was what he stooped for to pick up something. He turned sideways in his wagon, with his head towards me. That would bring his head to the east, and he stopped to pick up something. He raised up, and a short time after he was struck. There was sufficient space for him to have escaped if he had stopped when I first called to him. The front part of the wagon was just opposite the south end of the north chute."

Page 38 of printed record, 71 of original.

On cross-examination he said:

"When I first saw Leak, the cars were coming down the grade; they were in motion. I called twice to Mr. Leak. Several seconds—perhaps ten seconds—elapsed between the two calls. I don't know that I can repeat the exact words that I used. In substance, I said, 'Look out, the cars are coming down the hill,' or 'The cars are coming down the hill.' My intention was that Leak should hear it. I couldn't say whether he did or didn't hear it. Leak kept driving right on in the same direction urging his team. I didn't notice him look around until he stooped after the first call. He kept still driving up the canyon. The second time I said in substance about the same thing. I cannot recall the words. At that time Leak stooped down. He didn't make any reply that I heard. I saw him stoop. I can not say that I saw him pick up anything, and my supposition is all I have to go on, as to why he stooped. I don't know; a few seconds elapsed, between the second call and the time of the collision."

Page 39 of printed record, 74 of original.

The defendant in error further testified as follows:

wagon; he then turned his head. After the cars struck his wagon, he hit his horses, and probably hit them twice. I am positive that after the cars hit his wagon, he hit his horses twice before his wagon was knocked over, and he didn't start to whip them before the cars struck the wagon. A man will whip pretty lively when in danger.

"I noticed the brakeman was looking at Leak. I was not excited so I could not notice these things. I had my presence of mind so much as I have now. I tried to warn Leak, but I stuttered. I don't know whether you call it stuttering or tongue tied, or what it was, I know I could not get the words out of my mouth. It must have been twenty minutes before Leak was extricated from the wreck."

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"The road I drove on was the one always traveled. After I got turned, I drove along up the track. I didn't hear any noise until the cars were right close on to me. I was in the *usually traveled* way, when the cars got close on to me. I heard the rattling of the cars. I don't know what I did then. The cars were right close onto me. I don't know whether I stopped, or hit the horses, or what I did. I remember the cars striking the wagon and throwing me to the ground, and I remember nothing after that. All I know is, there was a wheel of a wagon stood on my leg and a car on top of it. I couldn't say how long it stood there. The next thing I remember is, that they pried the wagon off me I was then taken to Mr. Mayne's house. I hadn't heard anything until the cars crashed into me. The whistle had not blown, or the bell rung. I wasn't doing anything differently, than I had in hauling ore there for the past year and a half, when I was hit by the cars."

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I saw him. I should judge I was about 50 or 60 feet away from him. I can not just say how loud I called. My intention was to warn him. I called loudly enough for a man to ordinarily hear at that distance. Leak kept driving on to the south. I did not see him make any motion directly after I called, but after he got up a little farther, he seemed to be urging his horses to go pretty fast, and I called to him a second time. By that time I was up on the track. Just after I called the second time he turned around, and I thought he was picking up his whip. I thought that was what he stooped for to pick up something. He turned sideways in his wagon, with his head towards me. That would bring his head to the east, and he stopped to pick up something. He raised up, and a short time after he was struck. There was sufficient space for him to have escaped if he had stopped when I first called to him. The front part of the wagon was just opposite the south end of the north chute."

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"When I first saw Leak, the cars were coming down the grade; they were in motion. I called twice to Mr. Leak. Several seconds—perhaps ten seconds—elapsed between the two calls. I don't know that I can repeat the exact words that I used. In substance, I said, 'Look out, the cars are coming down the hill,' or 'The cars are coming down the hill.' My intention was that Leak should hear it. I couldn't say whether he did or didn't hear it. Leak kept driving right on in the same direction urging his team. I didn't notice him look around until he stooped after the first call. He kept still driving up the canyon. The second time I said in substance about the same thing. I cannot recall the words. At that time Leak stooped down. He didn't make any reply that I heard. I saw him stoop. I can not say that I saw him pick up anything, and my supposition is all I have to go on, as to why he stooped. I don't know; a few seconds elapsed, between the second call and the time of the collision."

Page 39 of printed record, 74 of original.

The defendant in error further testified as follows:

"I heard Mr. Bippus' statement, that he called to me just prior to the accident. I didn't hear anyone call to me to look out for the cars."

Page 40 of printed record, 75 of original.

The foregoing is all the non-cumulative testimony which throws any light on the subject of the ability of defendant in error to have escaped injury by abandoning his wagon before the cars struck him.

For cumulative testimony on this point see re-cross and re-direct examination of Leak, page 12 of record.

This testimony does not seem to present any question about which rational men can dispute. It seems to show simply, that the man was run down without knowledge or warning of the imminence of his peril. Therefore on that ground, the trial court might have rightly refused the ninth request to charge.

The substance of the request, in so far as it bore on the general question of contributory negligence having been given, it was not error to refuse it.

Erie Railway Co. vs. Winter, 143 U. S. 61-75.

On the point that the ninth request of plaintiff in error is too much upon the weight of the evidence, this court, in considering a like request to charge, said:

"In determining whether the deceased was guilty of contributory negligence, the jury were bound to consider *all* the facts and circumstances as bearing upon that question, and not select one particular fact or circumstance as controlling the case, to the exclusion of all others."

Grand Trunk Railway, vs. Ives, 144 U. S. 408-433.

The ruling in the case last cited, determines the exact question presented by the eighth assignment of error, on this record.

Even though defendant in error might have known of

the danger in time to have escaped, by the excercise of coolness and expedition, and yet failed to do so, the plaintiff in error, if its negligence caused the disaster, would still be liable for the resulting injury, unless the failure of defendant in error to escape amounted to recklessness or rashness.

> "In the case of an employee of a railroad company, claiming to have been injured as the result of the company's negligence, this court has said, that in determining whether he has recklessly exposed himself to peril, or failed to exercise the care for his personal safety that might be reasonably expected, regard must always be had to the exigencies of his position, indeed, to all the circumstances of the particular occasion. Where human life, or personal safety is involved and the issue is of negligence, the law will not lightly impute negligence to an effort, made in good faith, to preserve the one, or to secure the other, unless the circumstances, under which that effort was made, show recklessness or rashness."
>
> Union Pacific Railway Co. vs. McDonald, 152 U. S. pages 262-281.

In conclusion, we confidently, but respectfully insist that there is no substantial or prejudicial error in this record.

The cause was carefully presented to the trial court and jury, and they awarded the defendant in error substantial damages.

We think the District Court under the circumstances might well have left the amount of damages assessed by the jury to stand without abatement. The defendant in error when injured, was a young man of 28 years in good health and of industrious habits, and capable of earning three dollars per day. The injury which he received has permanently disabled him from pursuing his avocation.

The evidence shows a strong case of negligence against plaintiff in error. The brakeman on the train had a clear

view and had he been looking could well have seen the defendant in error notwithstanding which, he did not apply the brakes till after the train had struck the wagon.

See testimony of witness Porter, page 22 of printed record, 42 of original.

The jury believed in the light of all the evidence, that defendant in error was without fault, and that if the servants of plaintiff in error had been attending to their duties properly, the disaster would not have happened.

It is respectfully submitted to this court, that the evidence amply justifies the verdict, that there being no error in the record which calls for a reversal, the judgment of the Territorial Supreme Court ought to be affirmed.

Orlando W. Powers.

Counsel for Defendant in Error, Frank Leak.